SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 417

THE UNITED STATES OF AMERICA AND MESTA MACHINE COMPANY, APPELLANTS

vs.

COUNTY OF ALLEGHENY, PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

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1a In the Court of Common Pleas of Allegheny County, Pennsylvania

No. 1560, July Term, 1942

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

IN RE APPEAL OF MESTA MACHINE CO.

from

ASSESSMENT BY THE BOARD OF PROPERTY ASSESSMENT, APPEALS, AND REVIEW OF ALLEGHENY COUNTY FOR THE YEAR 1942 OF PROPERTY IN WEST HOMESTEAD BOROUGH

Appearance Docket Entries

May 22, 1942, Appeal. Petition & Afft. filed May 20, 1942, Petition presented in open Court & an Appeal is ordered to be filed & Notice to be given to the Solicitor of Allegheny County.

Sept. 16, 1942, Amended petition for appeal from Tax Assessment presented in open Court allowed and ordered filed.

Sept. 16, 1942, Petition presented in open Court and a rule is granted upon County of Allegheny to show cause why leave should not be granted to the United States of America to intervene in this proceedings: returnable sec. reg.

Sept. 22, 1942, Answer of Allegheny County filed.

Oct. 19, 1942, Rule is hereby made absolute and United States of America is hereby allowed to intervene in above appeal.

2a Eo die, Exception noted to the Board of Property Assessment, Appeals, and Review of Allegheny County and bill sealed.

Nov. 4, 1942, Praecipe for Issue filed. (2008.)

Nov. 25, 1942, it is ordered that testimony taken be transcribed and filed of record. Eo die, Testimony lodged.

Dec. 9, 1942, Testimony filed.

Jan. 18, 1943, after the Taking of testimony & the hearing of arguments & upon consideration thereof the appeal is sustained, the Assessment of the Machinery owned by the United States of America in the sum of $618,000.00 is set aside, and the assessment of the Machinery of the Mesta Machine Co. is reduced from 2,489,085.00 to 1,871,085 Dollars. The County of Allegheny is ordered to pay the costs of this proceeding. Eo die, Exception noted to the Board of Property Assessment, Appeals and Review of Allegheny & bill sealed. Eo die, Opinion filed.

February 2, 1943, Certiorari in appeal ex parte Deft. to Supreme Court filed.
February 5, 1943, Notice filed.
Feb. 10, 1943, Notice Acceptance of Service filed.
From the Record.

[SEAL] WM. H. FRASHER,
Prothonotary.

3a In Court of Common Pleas of Allegheny County

Appeal from tax assessment and amended petition for hearing

Filed September 16, 1942

To the Honorable, the Judges of said Court:

The petition of Mesta Machine Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, respectfully represents:

1. Your petitioner is the owner of a tract of land situated in the Borough of West Homestead, Allegheny County, Pennsylvania, whereon it maintains a large plant devoted to the manufacture of rolling mill and other kinds of machinery. Said land and the buildings thereon are customarily assessed for taxation in the name of your petitioner.

2. On October 30, 1940, your petitioner contracted with the United States of America (hereinafter called the Government) to manufacture for it a quantity of large guns, over a considerable period of time. To enable your petitioner to produce said guns, the Government during the year 1941 caused to be purchased and/or produced, and to be installed at your petitioner's said plant, a considerable quantity of machinery and machine tools, such as lathes, planes, grinders, presses, shapers, milling machines, and cranes. All of said machinery and machine tools were and are the sole property of the Government, and by the terms of the contract of October 30, 1940, the Government has leased the same to your petitioner for use in the manufacture of the guns aforesaid for a nominal rental of One Dollar, and your petitioner is

4a obligated, upon termination or completion of performances of said contract to remove such machinery and machine tools from its premises and redeliver the same unto the Government.

3. Said machinery and machine tools are not permanently affixed to the real estate of your petitioner and your petitioner has no title to said machinery and machine tools or to any portion thereof, notwithstanding they are located presently upon its said

real estate; and the Government, being the sole owner of said machinery and machine tools, has no right, title, or interest whatever in the real estate of your petitioner upon which said machinery and machine tools are now located.

4. On or about January 1, 1942, the Board of Property Assessment, Appeals, and Review of Allegheny County revised the then existing assessment or valuation of your petitioner's real estate in the Borough of West Homestead, as the same had been fixed in the triennial assessment for the years 1940, 1941, and 1942 by adding thereto all of said machinery and machine tools so belonging to the Government and assessing and valuing the same in the total sum of $618,000. Attached hereto and made part hereof as Exhibit 1 (see County's Exhibit C, R. p. 65a et seq.) is a true and correct itemized list of the machinery and machine tools so additionally assessed to your petitioner, with the respective amounts at which the same have been assessed and valued as aforesaid.

5. On February 5, 1942, the date set by the Board of Property Assessment, Appeals, and Review for hearing objections
5a to such additional assessment, your petitioner appeared before said Board, fully advised said Board of the facts herein set forth, and made objection to the addition of said machinery items to its 1942 assessment. On April 20, 1942, said Board notified your petitioner that it had decided unanimously to maintain said 1942 machinery assessment of $618,000 against your petitioner.

6. On June 29, 1942, and again on July 29, 1942, at the instance of the United States, the Board of Property Assessment, Appeals, and Review heard objections by Mesta Machine Company and the United States of America to the assessment and gave further consideration to the questions involved. On July 30, 1942, the Board of Property Assessment, Appeals, and Review gave notice in writing to Mesta Machine Company that it reaffirmed its decision of April 20, 1942, maintaining as taxable for the year 1942 the items of machinery assessments totaling $618,000 assessed as on the property and in the ownership of Mesta Machine Company.

7. Your petitioner is advised, believes and therefore avers that the said assessment is illegal and void for the reasons that:

a. The action of the Board of Property Assessment, Appeals, and Review, in including said machinery and machine tools belonging to the United States in the assessment and valuation of real property of Mesta Machine Company, is illegal and without authority of law.

b. Said machinery and machine tools are not real estate of Mesta Machine Company within the meaning of the laws
6a of the State of Pennsylvania relating to assessment and taxation of real property.

c. The assessment is made upon or with respect to machinery and machine tools which are the sole property of the United States and are immune under the Constitution of the United States from taxation by the State of Pennsylvania, either to Mesta Machine Company or to the United States.

d. Said assessment and the taxes exacted thereunder are imposed upon property which is an instrumentality of the United States and constitute a direct and unconstitutional burden upon the United States.

e. If the laws of Pennsylvania properly construed and applied purport to authorize the assessment and taxation of said machinery and machine tools belonging to the United States, said laws are in violation of the Constitution of the United States, and are therefore invalid.

f. The Board of Property Assessment, Appeals, and Review, by including said machinery and machine tools belonging to the United States in the assessment and valuation of real property of Mesta Machine Company, has applied the provisions of the laws of the State of Pennsylvania relating to the assessment and taxation of real property in a manner which renders said law invalid under the Constitution of the United States.

8. Your petitioner being dissatisfied with the assessment of its property, hereby appeals from the assessment for the year 1942 of property in the Borough of West Homestead, made
7a against it by the Board of Property Assessment, Appeals, and Review, insofar as there is included therein the aforesaid items of machinery and machine tools belonging to the United States of America.

Wherefore, your petitioner respectfully prays your Honorable Court to hear and determine this, its appeal.

And it will ever pray, etc.

MESTA MACHINE COMPANY,
By FRANK A. MESTA,
Vice President.

[*Duly sworn to by Frank A. Mesta; jurat omitted in printing.*]

Order of Court

And now, September 16th, 1942, the foregoing amendment is allowed and ordered to be filed.

By the Court,

H. R., *J.*

8a In Court of Common Pleas of Allegheny County

Petition of the United States for leave to intervene and intervening petition and order

Filed September 16, 1942.

To the Honorable, the Judges of the Court of Common Pleas of Allegheny County, Pennsylvania:

The United States of America, by Samuel O. Clark, Jr., Assistant Attorney General of the United States, and Charles F. Uhl, United States Attorney for the Western District of Pennsylvania, respectfully alleges that it is interested in the outcome of this appeal and desires to become a party thereto by uniting with the appellant in furtherance of its claim, and as grounds therefor alleges and shows that:

1. The intervention for which leave is herein prayed is authorized by the Attorney General of the United States at the request of the Secretary of War.

2. Mesta Machine Company is a corporation organized under the laws of Pennsylvania, having its principal place of business in the Borough of West Homestead, County of Allegheny, State of Pennsylvania.

3. The board of Property Assessment, Appeals, and Review of Allegheny County is the body charged by law with the duty of making, or causing to be made, all assessments and valuations of real property within said County for the purpose of County, City, Borough, Town, Township, and School taxation.

9a 4. On or about November 1, 1940, Mesta Machine Company entered into a contract with the United States of America to manufacture for the United States a quantity of large field guns, which contract was amended by a supplemental agreement between Mesta Machine Company and the United States, dated February 24, 1941. A copy of said contract and a copy of said amendment thereto which are true and correct, except that there has been deleted therefrom certain figures not material to the present controversy, which in the public interest should not be disclosed, are attached hereto and made a part hereof.

5. To enable Mesta Machine Company to produce said guns the United States, under the terms of said contract, during the year 1941, caused to be produced certain machinery and machine tools and purchased the same and caused the same, together with other machinery and machine tools which were in possession of the United States, to be installed in a building owned by Mesta Machine Company and located in the Borough of West Homestead,

County of Allegheny. A list of all said machinery and machine tools, marked "Exhibit B" (see County's Exhibit C, R. p. 65a et seq.) is attached to the petition of Mesta Machine Company filed with this Court, in this Appeal, which list is incorporated herein by reference and made a part hereof.

6. All of said machinery and machine tools were the property of the United States prior to installation in the building of Mesta Machine Company, and are now and at all times since have been the property of the United States.

10a 7. Said machinery and machine tools were not permanently affixed to the real property of Mesta Machine Company, but were leased to Mesta Machine Company at a nominal rental for the period of the said contract, and for the sole purpose of use in the manufacture of said guns.

8. Mesta Machine Company has no title to said machinery and machine tools, or any portion thereof, and is bound by the terms of the contract to remove said machinery and machine tools from its plant within 90 days after termination of the contract, and to return the same to the United States, in good condition, wear, tear, and depreciation excepted.

9. On or about January 1, 1942, the Board of Property Assessment, Appeals, and Review of Allegheny County revised the then existing assessment and valuation of the real estate of Mesta Machine Company in the Borough of West Homestead, County of Allegeheny, as the same has been fixed in the triennial assessment for the years 1940, 1941, and 1942, by adding thereto all of said machinery and machine tools belonging to the United States, and assessed and valued the same in the total sum of $618,000. An itemized list of the machinery and machine tools so additionally assessed to Mesta Machine Company, marked "Exhibit 1," showing the amounts at which each of the same has been assessed and valued is attached to the petition of Mesta Machine Company filed with this Court, in this Appeal, and has been incorporated herein and made a part, hereof by reference by paragraph 5 above.

11a 10. On February 5, 1942, the date set by the Board of Property Assessment, Appeals, and Review for hearing objections to such additional assessment, Mesta Machine Company appeared before said Board, fully advised said Board of the facts herein set forth, and made objections to the assessment of the said machinery and machine tools in its 1942 assessment.

11. On April 20, 1942, the Board of Property Assessment, Appeals, and Review notified Mesta Machine Company that it had decided unanimously to maintain the assessment to Mesta Machine Company of the value of said machinery and machine tools fixed at $618,000.

12. On June 29, 1942, and again on July 29, 1942, at the instance of the United States, the Board of Property Assessment, Appeals, and Review heard objections by Mesta Machine Company and the United States of America to the assessment, and gave further consideration to the questions involved. On July 30, 1942, the Board of Property Assessment, Appeals, and Review gave notice in writing to Mesta Machine Company that it reaffirmed its decision of April 20, 1942, maintaining as taxable for the year 1942 the items of machinery assessments totaling $618,000 assessed as on the property and in the ownership of Mesta Machine Company.

13. The said assessment is illegal and void for the reasons that:

a. The action of the Board of Property Assessment, Appeals, and Review, in including said machinery and machine tools
12a belonging to the United States in the assessment and valuation of real property of Mesta Machine Company, is illegal and without authority of law.

b. Said machinery and machine tools are not real estate of Mesta Machine Company within the meaning of the laws of the State of Pennsylvania relating to assessment and taxation of real property.

c. The assessment is made upon or with respect to machinery and machine tools which are the sole property of the United States and are immune under the Constitution of the United States from taxation by the State of Pennsylvania, either to Mesta Machine Company or to the United States.

d. Said assessment and the taxes exacted thereunder are imposed upon property which is an instrumentality of the United States and constitute a direct and unconstitutional burden upon the United States.

e. If the laws of Pennsylvania properly construed and applied purport to authorize the assessment and taxation of said machinery and machine tools belonging to the United States, said laws are in violation of the Constitution of the United States, and are therefore invalid.

f. The Board of Property Assessment, Appeals, and Review, by including said machinery and machine tools belonging to the United States in the assessment and valuation of real property of Mesta Machine Company, has applied the provisions of the laws of the State of Pennsylvania relating to the assessment and taxation of real property in a manner which
13a renders said law invalid under the Constitution of the United States.

14. Under the terms of its contract the United States will be required to reimburse Mesta Machine Company for the amount of any taxes which it might be required to pay upon the valuation of said machinery and machine tools, and the entry of a judgment

upholding such assessments will impose a liability upon the United States to reimburse Mesta Machine Company in equal amount.

15. The determination of the Appeal of Mesta Machine Company may affect the legally enforceable interests of the United States, whether or not it would be bound by a judgment in this action.

Wherefore, your petitioner, United States of America, respectfully prays that leave be granted to it to intervene in this action, but an order be entered allowing intervention, and that this Petition for Leave to Intervene be considered and adopted by this Court as the Intervening Petition of the United States. Your petitioner further prays that judgment be entered herein determining that said machinery and machine tools are the property of the United States and may not be assessed or taxed, that the assessment made upon the said machinery and machine tools, and the value thereof, by the Board of Property Assessment, Appeals, and Review is illegal, void, and of no effect, and for such other and further relief as to this Court may seem proper.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
CHARLES F. UHL,
United States Attorney.

14a [*Duly sworn to by Charles F. Uhl; jurat omitted in printing.*]

Order of Court

Now, to wit, September 16th, 1942, the foregoing petition having been presented in open court, it appearing that notice of said presentation has been given to the County Solicitor of Allegheny County, a rule is granted upon County of Allegheny to show cause why leave should not be granted to the United States of America to intervene in the above-entitled proceeding; returnable, sec. reg.

By the Court.

H. R.

15a In Court of Common Pleas of Allegheny County

Answer of the County of Allegheny to the Petition of the United States for Leave to Intervene

Filed September 22, 1942

And now comes the Board of Property Assessment, Appeals, and Review of Allegheny County, by Walter P. Smart, County Solicitor, and for answer to the petition of the United States for leave to intervene, submits the following:

First. The averments of fact set forth in the petition do not require an answer for the reason that said averments are not relevant or material to the issue involved in the petition, to wit, the right of the United States to intervene in an appeal of the Mesta Machine Company from an additional real estate assessment made by the Board of Property Assessment, Appeals, and Review of the County of Allegheny.

Second. In further answer to said petition to intervene the County of Allegheny avers that the right of appeal from a property assessment is not an absolute right but a right derived from the statutory law allowing and authorizing such an appeal by the property owner and the County further avers that the appellant property owner cannot, by reason of a contractual relationship with a third party, extend to that third party, in this case the United States, the statutory right of appeal.

Third. The additional assessment which is the basis for this appeal was made against the Mesta Machine Company as the owner of the property and every issue of fact or law that
16a the United States might raise at the hearing of this appeal can be raised by the Mesta Machine Company.

Wherefore your Respondent prays your Honorable Court that the rule to show cause why the United States should not be allowed to intervene be discharged.

COUNTY OF ALLEGHENY,
By WALTER P. SMART,
County Solicitor.

In Court of Common Pleas of Allegheny County

Opinion and Order

Filed October 19, 1942

Opinion by ELLENBOGEN, J.

The Board of Property Assessment, Appeals, and Review of Allegheny County increased the ad valorem property taxes of the Mesta Machine Company for the year 1942 by including therein the value of certain additional machinery which had recently been installed in its plant in West Homestead Borough, Allegheny County, Pennsylvania. Upon refusal of the Board to rescind this assessment, the Mesta Machine Company, on May 20, 1942, filed an appeal in this Court. On September 16, 1942, by leave of court, it filed an amended petition of appeal. It is averred in this petition that title to certain machinery located in its plant and assessed by the Board of Property Assessment at $618,000.00 is not in the Mesta Machine Company but is in the United States of America and that said machinery is therefore

immune from taxation by the State of Pennsylvania or its municipal subdivisions, under the provisions of the Constitution of
17a the United States. The appeal asks that the assessment be vacated and set aside.

On September 16, 1942, at the request of the Secretary of War and at the direction of the Attorney General of the United States, the United States of America by S. O. Clark, Jr., Assistant Attorney General of the United States, and Charles F. Uhl, United States Attorney for the Western District of Pennsylvania, filed a petition praying for leave to intervene in this appeal, and a rule was granted upon the Board of Property Assessment to show cause why the United States of America should not be permitted to intervene in the appeal.

On September 22, the Board of Property Assessment, Appeals, and Review of Allegheny County, filed an answer to the petition to intervene in which it did not deny the averments of fact contained in the petition of the United States, but averred that the assessment having been made against the Mesta Machine Company and not against the United States of America, the United States should not be permitted to intervene. This answer is in effect a demurrer to the petition. In view of the failure of the Board of Property Assessment to deny the averments of fact contained in the petition of the Government, these averments must be considered as having been admitted. The oral argument before the court en banc and the briefs filed with us are based on that assumption.

The only question before us is the narrow legal question whether the United States of America has such an interest in the appeal that it should be permitted to intervene. The admitted facts are as follows:

18a The Mesta Machine Company, appellant, is a corporation organized under the laws of the Commonwealth of Pennsylvania, having its principal place of business in the Borough of West Homestead, County of Allegheny, State of Pennsylvania. It is the owner of a large tract of land located in said Borough on which it maintains a large industrial plant devoted to the manufacture of heavy machinery used for the equipment of steel mills and elsewhere. Said tract of land and the buildings erected thereon, including the machinery located therein, have customarily been assessed for taxation by the County of Allegheny and the Borough of West Homestead in the name of the Mesta Machine Company.

On November 1, 1940, the Mesta Machine Company entered into a contract with the United States of America under which it undertook to manufacture for the United States a quantity of

large field guns. To enable the Mesta Machine Company to manufacture the guns, and as a part of its contract entered into with the United States, the United States purchased or caused to be produced, and installed at the plant of the Mesta Machine Company in West Homestead, special machinery and machine tools such as lathes, planers, grinders, presses, shapers, milling machines, and cranes. Under the contract the machinery, tools, and other equipment are owned by the United States but are leased to Mesta Machine Company for a fee of $1.00. The contract between the United States and the Mesta Machine Company contains, inter alia, this provision:

19a Article I–D

"1. The Contractor shall be reimbursed in the manner hereinafter described for----------

(g) Payments from his own funds made by the Contractor (the Mesta Machine Company) under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor."

Title III, Article III–E–1 (b) also contains a clause which provides that certain taxes should be reimbursed to the Mesta Machine Company, but we are not considering this clause, because, in our opinion, it refers to "transaction" taxes, popularly known as "sales" taxes and not to real property taxes.

20a It seems clear from a reading of Article I–D (g that the United States of America will be required to reimburse Mesta Machine Company for any real estate or local tax which Mesta Machine Company will be required to pay upon the property of the United States located in the Mesta Machine Company plant. The United States has freely admitted this obligation.

Counsel for the Government has called our attention to the fact that the United States of America has similar arrangements with other corporations in the County of Allegheny which manufac-

[1] Title III, Article III–E–1 (b):
"State, County, and Municipal Taxes.—The contract prices as stated in Article III–D herein do not include any tax imposed by any state, county, or municipality upon the transaction of this purchase of guns. The Government shall not be liable, directly or indirectly, for the payment of any such taxes, except that if the Contractor after using every effort short of litigation to procure exemption or refund, as the case may be, should be compelled to pay to any state, county, or municipality, any tax upon the transaction of this procurement, an amount equal to the tax so paid shall be paid by the Government on demand of the Contractor, in addition to the prices herein stated."

ture war material for the Government with machinery owned by the United States and leased to these corporations which are valued at large sums of money. We have been advised that this is a test case not only for Allegheny County but throughout the United States of America and that local taxes on property valued at billions of dollars owned by the United States and leased to manufacturers of war materials are involved.

The issue now before us is the preliminary question whether under these facts the United States of America, who must ultimately pay the taxes involved if the assessment is sustained, should be permitted to intervene and contest the validity of the assessment.

It is contended by the United States but denied by the Board of Property Assessment that the Government has the right to intervene under Rule 2327 of the Pennsylvania Rules of Civil Procedure. In their brief counsel for the Board of Property Assessment strenuously contend that the Pennsylvania Rules of Civil Procedure do not apply.

21a We are unanimous in our opinion that we should permit the United States of America to intervene and have arrived at this opinion without taking into account Rule 2327.

While the assessment of these taxes is against the Mesta Machine Company and not against the Government, the real party in interest is the United States of America, because, under its contract with the Mesta Machine Company, it must reimburse the Company if the assessment is sustained and the tax collected. Therefore, equity and justice require that the United States be given a day in court, that it be directly represented and be permitted to contest the validity of the assessment by its own counsel instead of being obliged to depend upon the Mesta Machine Company who may have no real interest in the outcome of this appeal. Moreover, as we have already pointed out, it is not merely an assessment upon machinery in the sum of $618,000.00 which is involved here, but this is a test case which will involve the assessment of local taxes upon billions of dollars of Government-owned property. The contract before us was evolved by the necessities of a war of global proportions and represents a departure from methods previously used by the Government to obtain its ordnance.

If the contention that the Pennsylvania Rules of Civil Procedure do not apply is valid, then the question of intervention is within the sound discretion of this Court: Tonkonogy v. Levin, 106 Pa. Superior Ct. 448, and we have no hesitation to exercise this discretion in favor of the United States of America, because we are clearly of the opinion that the public interest and

22a sound public policy require us to permit the Government to intervene in the appeal before us.

The contention of counsel for the Board of Property Assessment, so ably presented in their brief, that the right of appeal from an assessment of real estate taxes is governed by the Act of Assembly of June 21, 1939, P. L. 626, which allows an appeal only by the "taxpayer" and that the United States has no right to appeal because the Mesta Machine Company is the taxpayer and not the United States, has no force on the question of intervention. The United States is not attempting to appeal from this assessment, but is only asking to be permitted to intervene in the appeal of the taxpayer, the Mesta Machine Company, so that the Government may have an opportunity to appear in Court and contest the validity of the assessment of taxes which, if sustained, it must pay. The Act of 1929 which provides that a taxpayer may appeal from the final assessment does not deprive this Court of its inherent power to permit the intervention of the real party in interest whenever we believe that sound policy so requires.

There is still another reason why this petition to intervene must be granted and that is Rule 2327 of the Pennsylvania Rules of Civil Procedure. This rule reads as follows:

"Rule 2327. Who may Intervene.

"At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if

"(1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such per-
23a son to indemnify in whole or in part the party against whom judgment may be entered; * * *"

The United States of America must indemnify the Mesta Machine Company for any judgment entered in the proceedings before us, and thus the Government is directly within the terms of this rule. But the Board of Property Assessment, Appeals and Review of the County of Allegheny contends that this rule does not apply because an appeal from an assessment by the Board is not an "action" as this term is used in the rule. It contends that an appeal from its assessment to this Court is a "special proceeding" and not inherently a judicial proceeding, citing 1 C. J. S. 1093, and Philadelphia Company's Petition, 210 Pa. 490. Rule 2326 defines "action" as follows:

"As used in this chapter 'action' means any civil action or proceeding at law brought in or appealed to any court of record which is subject to these rules."

The appeal pending in this Court is clearly a "proceeding at law * * * appealed to any court of record * * *", and thus subject to the Civil Rules of Procedure. When such appeal

is heard in this Court it is heard de novo subject to our rules of evidence and in accordance with our usual and customary procedure.

We hold that the Pennsylvania Rules of Civil Procedure apply to this appeal and that they require that the United States of America be permitted to intervene.

Since it has been urged upon us that to permit the United States of America to intervene in this appeal might be in-
24a. terpreted as a precedent for the intervention of conditional vendors, mortgagees, and other lienees of heavy machinery installed in manufacturing plants, we state that this opinion is not intended and should not be taken as a precedent for such intervention, but has application only in the peculiar and particular circumstances of the case at bar. It will also be clear that in this opinion we have only dealt with the right of the United States of America to intervene in the pending appeal, and not with the question whether the assessment of the Board of Property Assessment, Appeals, and Review of the County of Allegheny is valid or contrary to law. That is an issue which will be determined when this appeal is heard.

Order

And now, to wit, this 19th day of October A. D. 1942, the rule to show cause heretofore granted is made absolute and the United States of America is hereby allowed to intervene in the appeal pending at the above-mentioned number and term.

By the Court.

Ell.

Eo die, exception noted to the Board of Property Assessment, Appeals, and Review of Allegheny County, and bill sealed.

[SEAL] HENRY ELLENBOGEN, *Judge.*

25a In Court of Common Please of Allegheny County

Statement of Evidence

PITTSBURGH, PA.,
Thursday, November 19, 1942.

Coram: Hon. HENRY ELLENBOGEN, J.

Counsel present: Carl F. Glock, Esq., for Mesta Machine Company. Paul F. Mickey, Esq., for U. S. Dept. of Justice, for the Appellants. Harry M. Montgomery, Esq., for County of Allegheny, for the Appellee.

The COURT. What is this to be, a final hearing?

Mr. GLOCK. If the Court please, I am uncertain about that. I thought it was to be a Pre-Trial conference. We have been trying to get together with the County on a stipulation of facts. We believe ninety-five percent of the case can be offered in a stipulation of facts. We came here today thinking this was to be a Pre-Trial conference to determine what stipulation can be reached.

The COURT. I thought it was purely a question of law.

Mr. GLOCK. I think it is.

26a The COURT (to Mr. Montgomery). Will you so agree?

Mr. MONTGOMERY. We discussed the stipulation that is prepared and came to the conclusion we do not want to stipulate as to the facts set forth in the prepared paper. In the first place, we object to the admissibility of all of the facts that are involved.

The COURT. They may not be admissible, but if they are facts they are facts. The question of admissibility is a question of law.

Mr. MICKEY. We didn't think there was any fact that was at issue. If there is any fact that is at issue perhaps we can adjust that right now. There certainly wouldn't be more than one or two.

Mr. MONTGOMERY. I don't believe the County would execute that. Maybe I can get along if you read into the record the Statement paragraph by paragraph and doing it in that fashion rather than just signing a stipulation.

The COURT. Let us do that and this is a final hearing on the case.

Mr. MONTGOMERY. Any facts I won't admit as we go along or any changes in them that necessitate additional evidence I presume you reserve the right to submit it later and anything I am to deny I want to contest and reserve the right to offer some evidence on that.

Mr. GLOCK. We are willing to proceed with this case to-
27a day as if a fiinal hearing subject to bringing in testimony not admitted by the County.

The COURT. Let's go ahead.

Mr. MICKEY: Wouldn't it be better to resolve any facts before we read them?

The COURT. Mr. Montgomery seems to be in the position where he is not authorized to sign any stipulation. As you go along, if he does not agree he will object.

Mr. MONTGOMERY. I may object to the admissibility.

J. VINCENT SEXTON, a witness called on behalf of the Appellee, being duly sworn, testified as follows:

Direct examination by Mr. MONTGOMERY:

Q. What is your name?

A. J. Vincent Sexton.

Q. What is your office?

A. Office manager and chief clerk, Board of Property Assessment, Appeals and Review, Allegheny County.

Q. In such capacity do you have charge of the records of the Board?

A. I do.

Q. Do you have with you the real estate assessment record for West Homestead Borough for the year 1942?

A. Yes, sir.

28a Q. Do you have in that record the assessment of the Mesta Machine Company?

A. Yes, sir.

Q. For 1942. What is the assessment in the name of the Mesta Machine Company for that year, in West Homestead Borough?

A. $3,901,504.

Q. Was that the original assessment on that for 1942?

A. No, sir.

Q. What was the original total assessment?

A. The original total assessment was $3,906,004.

Q. How do you account for the difference?

A. There are two items that were incorrectly assessed and have since been assessed to Pennsylvania Railroad exempt and which amount has been taken from the original assessment and credited to Mesta.

Q. And what is that amount?

A. $4,500.

Q. Can you give us the elements making up that total assessment?

A. Well, it consists of land, buildings, and machinery.

Q. What is the total assessment of land?

A. I would have to look at the transcript.

(Appellee's Exhibits "A" and "B" marked.)

By Mr. MONTGOMERY:

Q. I show you this Exhibit "B" and ask you to identify that, if you can, Mr. Sexton?

A. Exhibit "B" is a transcript of the property assessed

29a in the name of Mesta Machine Company by Allegheny County and located in West Homestead Borough, for the year 1942.

Q. Is your certificate attached to that?

A. Yes, sir.

Q. Does that disclose the elements making up this total assessment for 1942?

A. Yes.

Q. What are those elements?

A. Land, buildings, and machinery. The total assessment on land $293,795. Total assessment on buildings $1,123,124. Machinery $2,489,085. I might say that that is the break-down of the original total assessment.

Q. Without the——

A. Without the exoneration of $4,500 taken off?

Q. To what item would that $4,500 credit be chargeable?

A. That's on buildings.

Q. That assessment was made by whom, Mr. Sexton?

A. By the assessor of West Homestead Borough.

Q. Do you know what his name is?

A. Mr. Cosgrove, William Cosgrove.

Q. Do you have a record of assessments of West Homestead Borough for Mesta Machine Company in 1941?

A. Yes, sir.

Q. What was that assessment?

A. Total assessment for 1941, $2,555,590.

Q. And do you have the elements?

A. That consists of assessments on land, buildings, and machinery.

30a Q. I show you this Exhibit "A" and ask you to identify that.

A. Exhibit "A" is the 1941 transcript of property assessed by Allegheny County owned by Mesta Machine Company, or, rather, in the name of Mesta Machine Company and located in West Homestead Borough.

Q. And the total of each of the items comprising that assessment?

A. Total assessment on land $274,855. Total assessment on buildings $761,150. Total assessment on machinery $1,519,585. Makes a total assessment of $2,555,590.

Q. Of your own knowledge, Mr. Sexton, do you know why the assessment was increased in 1942 over what it was in 1941?

A. No, sir.

Q. Did the same assessor make the assessment in 1941 who made it in 1942?

A. Yes, sir.

Cross-examination by Mr. MICKEY:

Q. In making the assessment upon the property of Mesta Machine Company, was any distinction made between the property

of the United States and the property of Mesta Machine Company?

A. I couldn't answer that; I am not the assessor.

Mr. MONTGOMERY. I have the assessor here to testify.

Mr. MICKEY. That's all.

31a WILLIAM COSGROVE, a witness called on behalf of the Appellee, being duly sworn, testified as follows:

Direct examination by Mr. MONTGOMERY:

Q. What is your name?

A. William Cosgrove.

Q. What is your office or occupation?

A. Assessor for Allegheny County.

Q. Are you assigned to any particular district?

A. Thirty-first Ward, City of Pittsburgh, and West Homestead Borough.

Q. What do you assess?

A. Assess real estate.

Q. Were you acting in that capacity in making the assessments for 1941 and 1942?

A. Yes, sir.

Q. Did you have occasion to make an assessment of the property of Mesta Machine Company in West Homestead Borough for 1942?

A. Yes, sir.

Q. I show you Exhibits "A" and "P," which have been identified by Mr. Sexton as transcripts of the record of the assessments of the Mesta Machine Company in West Homestead Borough for 1941 and 1942. Can you state from an examination of those if they are correct copies of your assessments of that property for those years?

A. Yes, sir; they are.

Mr. MONTGOMERY. If the Court please, counsel for the Ap-
32a pellant and I have agreed to limit the remaining part of the testimony to one item of $618,000 on certain machinery for 1942. With that in mind, I will limit the questioning to that point.

The COURT. Yes.

Mr. MONTGOMERY. Except for one question.

By Mr. MONTGOMERY:

Q. Those exhibits show that the assessment for 1942 is higher than it was for 1941. What is the reason for that?

A. Well, the Mesta Machine Company in 1941 acquired some new land, built additional buildings, and also installed new machinery in their plant.

Q. And for that reason the assessment was increased for '42?

A. Yes, sir.

Q. What is the Mesta Machine Company?

A. Well, the Mesta Machine Company is a corporation situated in West Homestead Borough, a mill, I would call it, a mill or a manufacturer.

Q. This assessment was made as of real property?

A. That's right.

Q. In Exhibit "B" which is the 1942 assessment, you have an item of machinery of $618,000?

A. Yes, sir.

Q. Do you know where that particular machinery is located on the Mesta property and what it is?

A. Yes, sir.

Q. Where is the machinery covered by that item located on the Mesta property?

A. In the Ordnance Department.

33a Q. Is that a building or a group of buildings?

A. It is a group of buildings.

Q. Is there any identification on the buildings as to being Ordnance Department?

A. It is designated on the transcript here for 1942 as the Ordnance Department grouped in three separate aisles known as "A," "B," and "C."

Q. Did you make an examination of the machinery covered by that item?

A. Yes.

Q. Do you know about when you examined that?

A. October, 1941.

Q. Did you make the examination alone?

A. No, sir; I had the assistance of the special machinery assessor, Mr. Frauenheim.

Q. Did you make a list of that machinery at that time?

A. Yes, sir.

Q. Do you have a list of that machinery in your records there?

A. Mr. Frauenheim has a list of the machinery, an itemized list of the machinery.

Mr. MONTGOMERY. If the Court please, counsel will agree to submit a list of the items of machinery covered by this $618,000 as part of the record.

The COURT. Who will submit it?

Mr. MONTGOMERY. It will be stipulated by counsel for the Appellant and counsel for the County as a list of the machinery covered by this one item of $618,000.

34a The COURT. You mean today?

Mr. MONTGOMERY. Yes.

The COURT. Do you have it now?

Mr. MONTGOMERY. We have a list that has been made part of this stipulation of facts that was submitted but it is really not in the form to submit.

The COURT. All right.

Mr. MONTGOMERY. We reserve the right to submit that.

The COURT. All right.

By Mr. MONTGOMERY:

Q. This particular machinery was installed in what manner when you assessed it, Mr. Cosgrove?

A. It was installed in the regular manner that all the machinery in the Mesta Machine Company is installed.

Q. And how is that?

A. All these machines that they have, boring machines and drill presses and such machinery installed and bolted to the foundation.

Q. What sort of foundation?

A. Concrete foundation.

Q. Is it elevated off the floor or sunken in?

A. In some cases it is elevated and some cases it is sunken in the floor.

Q. All of them are bolted into the foundation?

A. Yes, sir.

35a Q. Are these foundations especially built to accommodate the particular machines, or are they a general type of foundation?

A. They are built to suit the type of machine.

Q. Was there any identification mark on these machines at the time your assessment was made?

A. In October, 1941, when Mr. Frauenheim and myself appraised them, there was no identification mark on the machinery other than regular identification mark of the Mesta Machine Company machinery.

Q. Did all this machinery of the Mesta Machine Company have identification marks?

A. Yes, sir; I wouldn't say all the machines, most of the machines.

Q. What type of identification mark was that?

A. They just have a certain number; that is an alphabetical letter and number in back of it.

Q. Are they plates that are attached to the machine, or are they painted on?

A. Some places they are stenciled with plates right on the machine and other places they are cut right in the machine, these numbers, parts of the machine itself.

Q. How are they recognized with numbers on other machines of the Mesta?

A. In October they just looked the same as the rest of the Mesta Machine Company machinery that was installed.

Q. Are these numbers in series that you can tie in to other machines?

A. As you go from one department to the other, different groups of buildings, they have different serial numbers.

36a Mr. MICKEY. I wish to object to the materiality as to any serial numbers and any marks on the machinery designated as Mesta machines.

Objection overruled.

By Mr. MONTGOMERY:

Q. Could you identify these numbers as being Mesta numbers?

A. No; I wouldn't say that.

Q. How were they similar to these other numbers on other Mesta machines?

A. They were the same type lettering and same type numbers that had been used on regular machines of the Mesta Company.

Q. Any initials on them to say Mesta Machine Company?

A. No; I didn't see that.

Q. They just had a number?

A. That's right.

Q. I understand the type of enumerating these machines and the type number was similar to that used on other Mesta equipment, is that correct?

A. That's right.

Mr. MONTGOMERY. Cross-examine.

Cross-examination by Mr. MICKEY:

Q. You mentioned the manner in which the machinery in question was fastened to the floor or foundation of the Mesta building?

A. Yes, sir.

Q. I believe you said it was fastened with bolts?

37a A. That's right.

Q. It would be possible, would it not, to remove the machinery from the building without damage to the building itself?

A. You mean from the foundation?

Q. From the building. To remove it from the foundation, unscrew the bolts and remove it from the foundation without any damage to the actual building itself?

A. That's right.

Mr. MICKEY. That's all.

H. T. FRAUENHEIM, a witness called on behalf of the Appellee, being duly sworn, testified as follows:

Direct examination by Mr. MONTGOMERY:

Q. Your name, sir?

A. H. T. Frauenheim.

Q. What is your office or occupation?

A. Special machinery assessor for Allegheny County.

Q. How long have you been making appraisements of machinery for Allegheny County?

A. Seven years.

Q. Did you have occasion to make an appraisement or aid in an assessment of the machinery located at the Mesta plant in West Homestead for the year 1942?

A. Yes, sir.

Q. It has been testified in the assessment there is an item of $618,000 for machinery. Did you aid in the assessment of that item?

38a A. Yes, sir.

Q. You have the break-down or the items comprising that total assessment of machinery?

A. Yes, sir.

(Appellee's Exhibit "C" marked.)

By Mr. MONTGOMERY:

Q. Mr. Frauenheim, I show you a series of papers here marked Exhibit "C" and ask you to examine them before answering the next question.

A. Yes, sir.

Q. Can you tell what that is?

A. That's a copy of the record that we made originally of the assessment of the machinery in the Mesta plant at West Homestead.

Q. Now, is it a list of all the machinery or just the machinery in the Ordnance Building?

A. It is a list of the machinery in the Ordnance.

Q. Now, the total of that is $618,000, as has been testified. You aided in making that assessment, did you?

A. Yes, sir.

Q. Now, I call your attention to the numbers on the left hand side of the several sheets which are marked "Equipment numbers." Do you understand those markings and what they are?

A. Yes, sir.

Q. Will you explain to us just what those numbers represent?

A. They represent the identification mark which is a part of the Mesta Machine Company's plan of marking their equipment in their plant.

39a Q. Do those numbers correspond with other numbers on other equipment in other parts of the plant?

A. Exactly.

Q. In what manner do they correspond?

Mr. MICKEY. Object to the materiality of this question. Object to the question as being immaterial.

The COURT. What is the purpose?

Mr. MONTGOMERY. The purpose is to show that at the time this assessment was originally made these items here bore an identification, Mesta identification number, the same as the other machinery in the plant.

Mr. MICKEY. I understand, your Honor, that there will be no contention that the machinery actually belonged to the Mesta at the time. If that is the case any numbers that they bore is entirely immaterial. If the evidence is offered to show title to the machinery was in the Mesta Machine Company, that is one matter. If it is a matter of justifying the assessment, that is entirely immaterial because the true fact as to ownership of the property was pointed out to the Board of Assessment & Appeals. I don't see that it has any bearing on the case at all.

The COURT. We will permit it. You are not going into any details?

Mr. MONTGOMERY. No.

40a The COURT. To save time I will just permit it.

By Mr. MONTGOMERY:

Q. The figures at the right on those sheets, what do they represent, Mr. Frauenheim?

A. The value?

Q. Yes, sir.

A. They represent the assessed valuation.

Q. Of each particular machine?

A. Of each item; yes, sir.

The COURT. You don't contend, Mr. Montgomery, that title of these machines is in the Mesta Machine Company?

Mr. MONTGOMERY. Not absolute title if the Court please; no. Of course our position is they are part of the Mesta plant there; they form a part of the entire mill or manufactory.

Mr. MONTGOMERY. Cross-examine, Mr. Mickey.

Mr. MICKEY. No questions.

Mr. MONTGOMERY. If the Court please, I offer in evidence Exhibits "A," "B," and "C."

The COURT. Any objection?

Mr. MICKEY. No objection to the exhibits.

The COURT. Without objection, the exhibits will be admitted.

41a Mr. MONTGOMERY. The County rests.

APPELLANT'S CASE

Offer in evidence

Mr. MICKEY. If your Honor please, I offer in evidence the following agreed statement of facts prepared by counsel which I will read a paragraph at a time.

The COURT. You may proceed with the understanding if Mr. Montgomery has any objection to it he will make the objection as to each paragraph.

Mr. MONTGOMERY. Leave out the word "agreed," if you will.

Mr. MICKEY. All right.

The COURT. Well, it is offered as a statement of facts to which you agree——

Mr. MONTGOMERY. Unless objection is made.

The COURT. Unless you object to it paragraph by paragraph.

Mr. MONTGOMERY. I reserve the right also to object as to materiality.

The COURT. Yes. You do that as Mr. Mickey goes along.

42a Mr. MICKEY. Paragraph one: "Mesta Machine Company is a corporation organized under the laws of Pennsylvania, having its principal place of business in the Borough of West Homestead, County of Allegheny, State of Pennsylvania."

Mr. MONTGOMERY. No objection.

Mr. MICKEY. Paragraph two: "The board of Property Assessment, Appeals and Review of Allegheny County, hereinafter referred to as the Board, is a body charged by law with the duty of making, or causing to be made, all assessments and valuations of real property within said County for the purpose of county, city, borough, town, township, and school taxation."

Mr. MONTGOMERY. No objection to that paragraph.

Mr. MICKEY. Paragraph three: "As used herein, the term 'Officer in Charge' shall mean officer of the United States Army, Ordnance Department, assigned by the War Department as Officer in Charge to represent it and the Contracting Officer of the War Department and authorized to act for the United States in connection with the performance of the contract referred to hereafter, or the agents or representatives of such Officer in Charge; the term 'machinery and machine tools' shall mean machines and large, stationary, power driven tools, generally known as machine tools, but it shall not mean small hand tools."

43a Mr. MONTGOMERY. That is agreed to with this reservation, that there are no small hand tools included in this assessment; so that part is immaterial.

The COURT. This is only an agreement on the terminology.

Mr. MICKEY. That last sentence was inserted at the suggestion of the County.

The COURT. Yes.

Mr. MICKEY. To avoid the possibility that the Court might think there had been assessment of machinery as personal property.

Mr. MICKEY. Paragraph four: "On or about November 1, 1940, Mesta Machine Company entered into a contract with the United States, No. W-ORD-486, to manufacture for the United States a quantity of large field guns, which contract was amended by a supplemental agreement between Mesta Machine Company and the United States, dated February 24, 1941. A copy of said contract and a copy of said amendment thereto, which are true and correct except that there have been deleted therefrom certain figures not material to the present controversy that in the public interest should not be disclosed, are attached to and made a part of the Intervening Petition of the United States filed herein. Said copy of the contract and the amendment thereto are made a part hereof by reference."

44a Mr. MONTGOMERY. Objection is entered to that as being incompetent, irrelevant, and immaterial. The County does not deny, however, that there is such a contract in existence.

Mr. MICKEY. Your objection is that the statement is immaterial, not that it is incompetent. You agree that such a contract was entered into and that the copy of the contract as attached to the intervening petition of the United States which has been filed herein is a true and correct copy of the contract with the exceptions stated in this paragraph?

Mr. MONTGOMERY. Agree to that extent; yes, sir.

Objection overruled.

Exception noted.

Mr. MICKEY. Paragraph five: "Mesta Machine Company erected a building, #30, which is otherwise known as the Ordnance Building, on land owned by Mesta Machine Company, which was to be and was equipped with machinery and machine tools as set forth in Schedules A, B, and C of said contract and in the list attached to the petition of Mesta Machine Company filed herein, and in the document offered in evidence herein and marked as County's Exhibit 'C,' all of which machinery and machine tools were furnished by the United States, as provided in the contract and as hereinafter set forth."

Mr. MONTGOMERY. Down to the portion where it commences, "all of which machinery and machine tools were
45a furnished by the United States," is admitted, but the balance of the paragraph is not admitted at this time.

Mr. MICKEY. Perhaps it would not be objectionable to counsel for the County if we stated it this way: "All of which machinery and machine tools were acquired and installed in said building under the provisions of said contract and as hereinafter set forth." Does the County object to that statement?

Mr. MONTGOMERY. No; I will not object to that statement. I would like to enter an objection to the materiality of paragraph five just read, although I will agree to the truth of the statement as read.

The COURT. Objection overruled. You may proceed.

Exception noted.

Mr. MICKEY. "6. Most of the machinery and machine tools were produced by various manufacturers, other than Mesta Machine Company, and acquired from them by purchase of the United States from or through Mesta Machine Company; one of the machines was produced by Mesta Machine Company in its machine mills, and was purchased from Mesta Machine Company by the United States; and the remainder were supplied from stocks of the United States at the United States Arsenal at Watervliet, New York."

46a Mr. MONTGOMERY. Object to the materiality.

Objection overruled.

Exception noted.

Mr. MICKEY. "7. A list of the machinery and machine tools purchased from the manufacturers other than Mesta Machine Company, showing the assessed valuation of each, appears as sheets one, two, and three of County's Exhibit 'C,' and is made a part hereof, all of the same were purchased, shipped, delivered, and paid for in substantially the same manner as hereinafter set forth in a typical transaction showing the purchase of a 30-inch gun-boring and turning lathe purchased from American Tool Works Company, of Cincinnati, Ohio, which transaction was as follows:"

Mr. MONTGOMERY. Objected to as to materiality.

Objection overruled.

Exception noted.

Mr. MICKEY. "7 (a): Mesta Machine Company requested American Tool Works Company to furnish a quotation or proposal on the manufacture and sale of three 30-inch gun-boring and turning lathes. American Tool Works Company, on October 10, 1940, submitted to Mesta Machine Company a proposal, a true and correct copy of which is attached hereto, marked Exhibit 2, and made a part hereof."

Mr. MONTGOMERY. Objected to for the same reason.

47a Objection overruled.
Exception noted.

Mr. MICKEY. I will offer all of the exhibits at the end, your Honor.

Mr. MICKEY. "7 (b): Thereafter, on November 21, 1940, Mesta Machine Company prepared a purchase order for the purchase of three 30-inch gun-boring and turning lathes, on the basis of the proposal of American Tool Works Company, and submitted the same, together with the proposal, to the Officer in Charge for his approval of the purchase. A true and correct copy of said purchase order with the approval of the Officer in Charge endorsed thereon is attached hereto, marked Exhibit 3, and made a part hereof."

Mr. MONTGOMERY. Objected to for the same reason.

Objection overruled.

Exception noted.

Mr. MICKEY. "7 (c): Mesta Machine Company then forwarded the purchase order to American Tool Works Company, and the latter, on or about June 2, 1941, shipped one of said lathes, No. 01100, to the building of Mesta Machine Company, West Homestead, Pennsylvania, where it was unloaded and assembled by American Tool Works Company, and thereafter inspected by the Officer in Charge who prepared a Receiving Report, showing inspection and acceptance of the lathe by the Contracting
48a Officer. A copy of said Receiving Report is attached hereto, marked Exhibit 4, and made a part hereof. Said copy is true and correct except that there has been deleted therefrom certain matter which is immaterial to the present controversy, and which in the public interest should not be disclosed. Said Receiving Report shows that the shipping point and shipping destination were both in West Homestead Borough, for the reason that by prearrangement said boring and turning lathe was completed and assembled at the premises of Mesta Machine Company instead of at the plant of American Tool Works Company. In cases where the machine was small enough to be shipped assembled, Receiving Reports showed the shipping point as the mill of the producer and vendor. When the machine arrived at the building owned by Mesta Machine Company and was installed and assembled it was inspected by Mesta Machine Company at the same time that it was inspected by the Officer in Charge."

Mr. MONTGOMERY. Objected to as immaterial.

Objection overruled.

Exception noted.

Mr. MICKEY. "7 (d): American Tool Works Company, on June 7, 1941, sent to Mesta Machine Company an invoice on account

of the purchase above described, and upon approval of the Officer in Charge, the invoice was paid by Mesta Machine Company on July 7, 1941. A true and correct copy of said invoice of American Tool Works Company is attached hereto, marked Exhibit 5, and made a part hereof."

49a Mr. MONTGOMERY. Objected to for the same reason.
Objection overruled.
Exception noted.

Mr. MICKEY. "7 (e): Mesta Machine Company thereafter submitted its invoice for the 30-inch gun-boring and turning lathe, dated June 30, 1941, to the Officer in Charge, accompanied by the receipted invoice of American Tool Works Company. A true and correct copy of said invoice of Mesta Machine Company to the War Department, as submitted to the Officer in Charge, is attached hereto, marked Exhibit 6, and made a part hereof."

Mr. MONTGOMERY. Objected to for the same reason.
Objection overruled.
Exception noted.

Mr. MICKEY. "7 (f): The invoice of Mesta Machine Company was checked by the Officer in Charge against the Receiving Report, the invoice of American Tool Works Company, the purchase order, and the original quotation of American Tool Works Company. Upon finding the details correct, the Officer in Charge forwarded the invoice of the Mesta Machine Company with the receipted invoice of the American Tool Works Company to the Fiscal Division of the Pittsburgh Ordnance District of the War Department, for payment."

Mr. MONTGOMERY. Objected to for the same reason.
50a Objection overruled.
Exception noted.

Mr. MICKEY. "7 (g): The Fiscal Division of the Pittsburgh Ordnance District prepared Government voucher Form 1034 for reimbursement of payment to Mesta Machine Company, a true and correct copy of which is attached hereto, marked Exhibit 7, and made a part hereof, and forwarded the same to the Philadelphia Finance Office of the Ordnance Department of the War Department, and payment thereon was made in full by the United States to Mesta Machine Company by check drawn upon the United States Treasury."

Mr. MONTGOMERY. Objected to for the same reason.
Objection overruled.
Exception noted.

Mr. MICKEY. "8. A description of the machine tool which was produced by Mesta Machine Company and purchased from it by the United States showing the assessed valuation of the same ap-

pears on sheet #4 of the County's Exhibit 'C' and is made a part hereof by reference."

Mr. MONTGOMERY. Objected to for the same reason.

Objection overruled.

Exception noted.

Mr. MICKEY. "The transaction of the purchase of said machine tool was as follows:

51a 8 (a): Mesta Machine Company submitted its proposal, dated December 31, 1940, for sale of a trepanning lathe and boring tools, for the approval and acceptance of the Officer in Charge, and said proposal, when approved for purchase by the Officer in Charge served also as purchase order from the United States. A copy of said proposal and purchase order is attached hereto, marked Exhibit 8, and made a part hereof. Said copy is true and correct except that there has been deleted therefrom certain matter which is immaterial to the present controversy, and which in the public interest should not be disclosed."

Mr. MONTGOMERY. Objected to for the same reason.

Objection overruled.

Exception noted.

Mr. MICKEY. "8 (b): Thereafter Mesta Machine Company completed production of said trepanning lathe and boring tools in one of its machine tool mills and delivered same to the aforesaid building owned by Mesta Machine Company, where they were inspected by the Officer in Charge, who prepared a Receiving Report, showing inspection and acceptance thereof by the Contracting Officer. A true and correct copy of said Receiving Report is attached hereto, marked Exhibit 9, and made a part hereof."

Mr. MONTGOMERY. Objected to for the same reason.

Objection overruled.

Exception noted.

52a Mr. MICKEY. "8 (c): Thereafter Mesta Machine Company submitted to the Officer in Charge its invoice to the War Department, dated September 30, 1941, on account of the purchase above described and on account of some parts for machinery and machine tools, produced by Mesta Machine Company and sold to the United States under its contract during the period covered by said invoice, and also on account of services rendered and material expended in repair and improvement of eight boring lathes belonging to the United States and shipped to the building of Mesta Machine Company as set forth hereinbelow in paragraph 9. A true and correct copy of said invoice is attached hereto, marked Exhibit 10, and made a part hereof."

Mr. MONTGOMERY. Object to the wording "belonging to the United States," in that fashion.

Mr. MICKEY. Counsel understands that these eight boring lathes referred to were shipped from the United States Arsenal at Watervliet, New York.

Mr. MONTGOMERY. Yes; I understand that, but I think that is more or less a conclusion of law, "belonging to the United States," in this respect, that after the shipment and receipt of same by Mesta the title may have been in the United States, but nevertheless Mesta had an interest as lessee there. I think it should be explained along that basis.

Mr. MICKEY. There is a succeeding paragraph which
53a states that that machinery concerned in this assessment, was placed in the plant of Mesta under the terms of the contract.

Mr. MONTGOMERY. I will object to the materiality of that paragraph and ask that the wording—I will let my objection stand as being a conclusion, the manner of ownership.

Mr. MICKEY. Counsel does not contend that the ownership of machines shipped from the Arsenal and belonging to the United States was changed by any other proper manner than as you conceived it by the provisions of the contract?

Mr. MONTGOMERY. That's correct.

The COURT. We can't receive it if it is objected to, but I don't see what the objection is.

Mr. MONTGOMERY. The way it is expressed.

The COURT. They improved eight lathes that belonged to the United States. Shipping to the Mesta Machine didn't change their title.

Mr. MONTGOMERY. Legal title undoubtedly did remain there. The qualified interest of Mesta is not brought out here.

The COURT. Will you change it and say "Legal title to which was in the United States"?

Mr. MONTGOMERY. That's right.

54a Mr. MICKEY. That is perfectly agreeable.

Mr. MONTGOMERY. Put "Legal title" rather than "Belonging to the United States," then I withdraw my objection as to the wording and renew my objection as to the materiality.

The COURT. How do you have it, "Legal title to which was in the United States"?

Mr. MICKEY. "In repair and improvement of eight boring lathes legal title to which was in the United States and which were shipped to the building of Mesta Machine Company."

Objection overruled.

Exception noted.

Mr. MICKEY. "8 (d): The invoice of Mesta Machine Company was checked by the Officer in Charge against the Receiving Report and the proposal and purchase order, and, upon finding the

details correct, the Officer in Charge forwarded the invoice, together with the Receiving Report, to the Fiscal Division of the Pittsburgh Ordnance District of the War Department for payment."

Mr. MONTGOMERY. Objected to as immaterial.

Objection overruled.

Exception noted.

Mr. MICKEY. "8 (e): The Fiscal Division of the Pittsburgh Ordnance District prepared a Government voucher for pay-
55a ment to Mesta Machine Company, a true and correct copy of which is attached hereto, marked Exhibit 11, and made a part hereof, and forwarded the same to the Philadelphia Finance Office of the Ordnance Department of the War Department. Payment thereon was made in full by the United States to Mesta Machine Company, by check drawn upon the United States Treasury."

Mr. MONTGOMERY. Objected to as immaterial.

Objection overruled.

Exception noted.

Mr. MICKEY. "9: A list of the machines and machine tools which were supplied by the United States from the United States Arsenal at Watervliet, New York, showing the assessed valuation of each, appears as sheet #5 of County's Exhibit 'C,' and is made a part hereof by reference, and the same were shipped by the United States from the Watervliet Arsenal and delivered at the aforesaid building of Mesta Machine Company. Exhibit 12, which is attached hereto and made a part hereof, is a true and correct copy of the shipping ticket, prepared by the Quartermaster Corps, United States Army, upon which shipment and delivery of said machinery and machine tools were made."

Mr. MONTGOMERY. Objected to for the same reason.

Objection overruled.

Exception noted.

Mr. MICKEY. "10: All of said machinery and machine
56a tools purchased by the United States as described in paragraph 7 and 8 above, together with those shipped from the United States Arsenal at Watervliet, as set forth in paragraph 9 above, were installed in the aforesaid building constructed by Mesta Machine Company, which building is referred to in paragraph 5 above, and were leased to Mesta Machine Company at the rental prescribed by the contract, for the period of the contract, and for the purposes specified in said contract."

Mr. MONTGOMERY. Objected to for the same reason.

Objection overruled.

Exception noted.

Mr. MICKEY. "11: Each of said machines and machine tools described in sheets 1 through 5 of County's exhibit 'C,' and all of them, are now marked 'United States Government Property, Contract No. W-ORD-486.' A photostatic copy of the metal tags which are affixed to each machine or machine tool is attached hereto, marked Exhibit 13, and made a part hereof. At the time of the assessment, approximately one-half of the machines and machine tools were so marked."

Mr. MONTGOMERY. I cannot agree to that as a fact and I also object to the materiality. It seems to be contradictory to what our assessor testified as to what he found out there at the time of making the assessment.

Mr. MICKEY. The witness' statement conflicts too with the
57a information we have, but as my objection to the testimony of County's witnesses disclosed, I don't think it is particularly material. However, it is agreed that the sentence, "At the time of the assessment, approximately one-half of the machines and machine tools were so marked," be struck out and that in its stead the following sentence be substituted, "At the time the County Assessors visited the aforesaid building of Mesta Machine Company and inspected the same for the purposes of assessment they were orally advised that the machinery installed in the building belonged to the United States and it is now so marked."

Mr. MONTGOMERY. Do you know when those marks were placed?

Mr. MICKEY. Our information is that approximately fifty percent of the machinery was marked some time prior to the date of the assessment. Now, whether that means the date of January under which they obtained the notice of the assessment, or whether it means the time of the inspection, I don't know.

Mr. MONTGOMERY. Our information is they were not marked in October when the Assessors visited the plant and made the assessment, but were marked in February or March when they made another trip out there.

The COURT. What difference would it make?

Mr. MONTGOMERY. It makes no difference so far as my
58a theory of this case is concerned; I object to it all as immaterial.

The COURT. If there is no further objection by counsel for the County, the objection as to its materiality is overruled.

Exception noted.

Mr. MICKEY. We agree, and your Honor is of the opinion, how it is marked now and how it was marked then is of no consequence. We have placed that in there because testimony was given by the witnesses for the County.

The COURT. I can't tell you what the Court's opinion is at this time.

Mr. MICKEY. We submit that as our opinion alone.

The COURT. All right.

Mr. MICKEY. Paragraph 12: "Said machines and machine tools are installed in the building and on the real estate of Mesta Machine Company in the same manner as similar machinery owned by Mesta Machine Company is or would be so installed."

Mr. MONTGOMERY. No objection.

Mr. MICKEY. "13: On or about January 1, 1942, the Board revised the then existing assessment and valuation of the real estate of Mesta Machine Company in the Borough of West Home-
59a stead, County of Allegheny, as the same had been previously fixed in the triennial assessment for the years 1940, 1941, and 1942, by adding thereto, among other items, the value of all of the said machines and machine tools, and assessed and valued the same in the total sum of $618,000. County's Exhibit 'C,' which is made a part hereof by reference, is a true and correct itemized list of the machines and machine tools so additionally assessed to Mesta Machine Company and shows the amount at which each of the same has been assessed and valued."

Mr. MONTGOMERY. No objection to that.

Mr. MICKEY. "14: On February 5, 1942, the date set by the Board for hearing objections to such additional assessment, Mesta Machine Company appeared before said Board and made objections to the assessment to it of said machinery and machine tools in its 1942 assessment, on the grounds that said machinery and machine tools were the property of the United States, and Mesta Machine Company further objected to said assessment on the grounds that said machinery and machine tools were leased to the Mesta Machine Company in its contract with the United States, and under the express provisions of the contract, was to be removed from its building, and returned to the United States within 90 days after termination of the contract."

Mr. MONTGOMERY. No objection to that.

Mr. MICKEY. "15: On April 20, 1942, the Board notified
60a Mesta Machine Company that it had decided unanimously to maintain the assessment to Mesta Machine Company of the value of said machinery fixed at $618,000, as part of its general assessment."

Mr. MONTGOMERY. No objection.

Mr. MICKEY. "16: On June 29, 1942, and again on July 29, 1942, at the instance of the United States, the Board heard objections by Mesta Machine Company and the United States to the assessment to Mesta Machine Company of said machinery and machine tools in its 1942 assessment, on the grounds that said machinery and machine tools were the property of the United States and were not subject to taxation by the County of Allegheny, and on

the further ground that said machinery and machine tools were leased to Mesta Machine Company in its contract with the United States and under the express provisions of the contract, were to be removed from its building and returned to the United States within ninety days after termination of the contract. The Board gave further consideration to the objections and to the questions involved and on July 30, 1942, it gave notice in writing to Mesta Machine Company that it reaffirmed its decision of April 20, 1942, maintaining as taxable for the year 1942 the items of machinery and machine tool assessments totaling $618,000, which it had assessed as a part of the real property of Mesta Machine Company."

61a Mr. MONTGOMERY. No objection to that.

Mr. MICKEY. "17: On July 30, 1942, Mesta Machine Company made payment to John J. McLean, County Treasurer for Allegheny County, of taxes assessed against it by the County of Allegheny for the year 1942, in the amount of $32,431.25. Said payment included the tax upon the assessment made by the Board on the machinery and machine tools which were in possession of Mesta Machine Company as set forth hereinabove. The amount of tax which was paid on account of the assessment of said machinery and machine tools is $5,137.12. Said $5,137.12 was paid under protest by Mesta Machine Company."

Mr. MONTGOMERY. I have to object to that payment under protest.

Mr. GLOCK. We have a copy of the letter.

Mr. MONTGOMERY. No objection if it is affirmed by Mr. McLean.

Mr. MONTGOMERY. It is admitted the payment was made under protest.

Mr. MICKEY. I would like to add this paragraph: In view of the fact we had expected to complete the stipulation of facts we prepared before going to trial, most of the exhibits do not have

62a signatures in the places at which they appear on the originals, the first copies. These papers are prepared with numerous duplicates and in each place where there is a signature typed on the face of the exhibit showing approval, or dissent, or whatever the particular document may show, we would like to have it agreed that the signatures appear on the documents in the form that they are typed on the face of the documents.

Mr. MONTGOMERY. I have no objection to your presenting photostats of the signatures, if that is what you mean?

Mr. MICKEY. We can either have the signatures written on there or can agree that the documents were all signed, as the originals were.

Mr. MONTGOMERY. Either way; I have no objection. I object to the materiality but so far as the existence of the exhibits is concerned I have no objection.

Mr. MICKEY. If the Court please, I would like to offer in evidence Exhibits Nos. 1 through 13, which are referred to in the Statement of Facts just presented.

Mr. MONTGOMERY. I renew my objection on the ground of being immaterial, to all of the exhibits.

The COURT. Objection overruled. The exhibits will be admitted. Exception noted.

Mr. MICKEY. We rest, Your Honor.

63a The COURT. No rebuttal?

Mr. MONTGOMERY. I don't think there is any rebuttal, no.

The COURT. No rebuttal.

Exhibit A

1941

MESTA MACHINE COMPANY

W. HOMESTEAD BOROUGH

	Land	Buildings	Machinery
Total	274,855	761,150	1,519,585

Total assessment—$2,555,590.00.

NOVEMBER 18, 1942.

The above transcript is a true and correct copy of the Assessment in the name of Mesta Machine Company in West Homestead Borough as shown by the books of this Office for the year 1941, at the above date.

BOARD OF PROPERTY ASSESSMENT,
APPEALS, AND REVIEW,
[SEAL] J. VINCENT SEXTON, *Clerk*.

64a *Exhibit B*

1942

MESTA MACHINE COMPANY

WEST HOMESTEAD BOROUGH

	Land	Buildings	Machinery
Total	293,795	1,123,124	2,489,085

Total Assessment	$3,906,004
ac #13928	4,500
	$3,901,504

NOVEMBER 18, 1942.

The above transcript is a true and correct copy of the Assessment in the name of Mesta Machine Company in West Homestead Borough as shown by the books of this Office for the year 1942, at the above date.

BOARD OF PROPERTY ASSESSMENT, APPEALS, AND REVIEW.
[SEAL] J. VINCENT SEXTON, *Clerk.*

65a

Exhibit C

Equip.	#	Machine	H. P.	Sheet No. 1
125	1	E. O. T. crane, 15 ton, 60' span (P-H)		$10,000
126	1	E. O. T. crane, 15 ton, 60' span (P-H)		10,000
127	1	E. O. T. crane, 15 ton, 60' span (P-H)		10,000
128	1	E. O. T. crane, 15 ton, 60' span		10,000
10800	1	Automatic machine (Keller)	5	3,500
	1	Tool grinder (P-W)	½	850
	1	M/G set, 10 EW	15	180
06104	1	24" Shaper (G-E)	5	1,500
06103	1	24" Shaper (P-J)	5	1,500
04202	1	Model H, #5 Vert. Milling machine (M)	15	3,000
04200	1	Model H, #5 Vert. Milling machine (m)	15	3,000
04201	1	Model H, #5 Vert. Milling machine (m)	15	3,000
05202	1	42" Vert. turret lathe (Bullard)	30	6,500
05203	1	42" Vert. turrett lathe (Bullard)	30	6,500
03100	1	Hypro slotter vert. (Rockford)	20	8,500
03101	1	Hypro slotter vert. (Rockford)	20	8,500
05800	1	Hypro slotter Horzi (Barnes)	25	9,500
66a 07100	1	Model F, 20" x 12' grinder (G-L)	25	6,200
13800	1	Universal broaching machine (Colonial)	40	10,000
21205	1	18" x 78" Engine lathe (American)	10	6,000
21206	1	18" x 78" Engine lathe (American)	10	6,000
21207	1	18" x 78" Engine lathe (American)	10	6,000
21208	1	18" x 78" Engine lathe, (American)	10	6,000
21000	1	Power saw (Marvel)	1½	1,200
21203	1	3' Radial Drill press (American)	7½	1,800
				Sheet No. 2
21200	1	Model H, #5 Vert. milling machine (M)	15	$3,000
21201	1	24" Shaper (G-E)	10	4,000
21202	1	24" Shaper (G-E)	10	4,000
21002	1	Double Grinder (U. S. Electric)	3	100
21204	1	Tool grinder (Ingersoll)	3	500
25003	1	Tool grinder (Sellers)	5	500
21100	1	Tool grinder (Norton)	¼	1,500
25002	1	Tool grinder (Sellers)	5	500
21004	1	Tool grinder (Sundstand)	5	500
21101	1	Tool grinder (Norton)	5	1,500
21006	1	Metal Master (Do All)	3	120
21005	1	Vert. drill press (Buffalo)	3	300
11202	1	5' Radial drill press (Carlton)	7½	2,500
67a 04100	1	Planer type milling machine (Ingersoll)	7½	7,500
04101	1	Planer type milling machine (Ingersoll)	7½	7,500
01803	1	Super. gun boring and turning lathe (American)	15 40 2	25,000
11203	1	Drill press (Lucas)	5	1,800
12200	1	#18 power saw (Marvel)	5	1,200
010801	1	Super gun boring and turning Lathe (American)	40 15	26,000
0182	1	Super gun boring and turning lathe (American)	40	25,000
01115	1	42" x 27' Turning lathe (Le Blonde)	40	9,500

Exhibit C—Continued

Equip.	#	Machine	H. P.	Sheet No. 2
01116	1	42" x 27' Turning lathe (LeBlonde)	40	$9,500
01113	1	42" x 27' Turning lathe (LeBlonde)	40	9,500
01114	1	42" x 27' Turning lathe (LeBlonde)	40	9,500
01111	1	42" x 27' Turning lathe (LeBlonde)	40	9,500
				Sheet No. 3
01112	1	42" x 27' Turning lathe (LeBlonde)	40	9,500
68a 08800	1	Honing Machine, 22' long (Barnes)	25 15	25,000
07800	1	Roll grinder (Farrell)	25	15,000
02204	1	#1, Automatic Turrettathe (W-S)	25	6,000
	1	10 Ton platform scale (Howe)		770
02203	1	Hyd. press 3' x 16' Planer (Cinci)	25	5,000
02201	1	Hyd. press 3' x 18' Planer (Cinci)	25	5,000
02.00	1	Hyd. press 3' x 18' Planer (Cinci)	25	5,000
02202	1	Hyd. press 3' x 18' Planer (Cinci)		5,000
05200	1	Boring drilling milling machine (G-L)	15	12,000
05201	1	Boring drilling milling machine (G-L)	15	12,000
11201	1	5' Radial drill press (Carlton)	7½	2,500
11200	1	3' Radial drill press (American)	5	2,500
01204	1	36" x 60" Engine lathe, H. D. (LeBlonde)	15	8,000
01203	1	36" x 60" Engine lathe H. D. (LeBlonde)	15	8,000
01202	1	36" x 60" Engine lathe, H. D. (LeBlonde)	15	8,000
01201	1	36" x 60" Engine lathe H. D. (LeBlonde)	15	8,000
60a 01200	1	36" x 60" Engine lathe (LeBlonde)	15	8,000
		Total		444,000
				Sheet No. 4
07800	1	Trepanning Lathe (Mesta)	2-15	$14,000.00
				Sheet No. 5
01103	1	42" x 60' Boring lathe (Bennett)	15 10 15	$15,000
01104	1	42" x 60' Boring lathe (Bennett)	10 15	15,000
01105	1	42" x 60' Boring lathe (Bennett)	10 15	15,000
01106	1	42" x 60' Boring lathe (Bennett)	10 15	15,000
01107	1	42" x 60' Boring lathe (Bennett)	10 15	15,000
01108	1	42" x 60' Boring Lathe (Bennett)	10 15	15,000
01109	1	42" x 60' Boring lathe (Bennett)	10 15	15,000
01110	1	42" x 60" Boring lathe (Bennet)	10	15,000
70a 09001	1	Rifling machine, 22' long (Bridgeport)	10	20,000
09000	1	Rifling machine, 22' long (Bridgeport)	10	20,000
				160,000

Exhibit 1

UNITED STATES OF AMERICA
(Coat of Arms)

WAR DEPARTMENT

WASHINGTON, *August 31, 1942.*

I hereby certify that I am the custodian of the contract files of the Office of The Chief of Ordnance, War Department, and that

the attached papers relating to Contract No. W-ord-486, dated October 30, 1940, with Mesta Machine Co., for guns, and Supplement No. 1 thereto dated Feb. 21, 1941, are true copies of papers in my custody in the Office of The Chief of Ordnance.

MARGARET O. GAYLORD,
Chief, Contract Section, Fiscal Branch,
Office of The Chief of Ordnance.

I hereby certify that Margaret O. Gaylord, who signed the foregoing certificate, is the custodian of the contract files of the Office of The Chief of Ordnance, War Department, and that to her certification as such full faith and credit are and ought to be given.

71a In testimony whereof I, Henry L. Stimson, Secretary of War, have hereunto caused the Seal of the War Department to be affixed and my name to be subscribed by the Assistant Chief Clerk of the said Department, at the City of Washington, this 31st day of August 1942.

[SEAL]

HENRY L. STIMSON,
Secretary of War.
By J. C. COOK,
Assistant Chief Clerk.

War Department Form No. 7.

Contract No. W-ORD-486

COST-PLUS-A-FIXED-FEE EQUIPPING LEASE OF GOVERNMENT-OWNED EQUIPMENT AND FIXED-PRICE (LUMP SUM) SUPPLY CONTRACT

WAR DEPARTMENT

Contractor: Mesta Machine Company, Pittsburgh, Pennsylvania.

Fixed-fee in lieu of profit of Contractor for producing or procuring and installing equipment in Contractor's plant: $1.00 under Title I.

Rental for lease of Government-owned equipment $1.00 under Title II.

Contract for: The production or procurement and installation of equipment in the Contractor's plant on a cost-plus-a-fixed-fee basis; the lease of the Government-owned equipment; and

72a the manufacture of guns, * * * on a fixed-price (lump-sum) basis.

Place: West Homestead, Pennsylvania.

Estimated cost of equipping * * * under Title I.

Total contract price for * * * guns, * * * complete * * * under Title III.

Payments to be made by and to the Finance Officer, U. S. Army, at Philadelphia, Pa.

The equipment, supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to, the following Procurement Authorities, the available balances of which are sufficient to cover the cost of same.

ORD 7404 P99 A 0141-01.
NG 15416 P57-3030 A 1405-01.
ORD 7640 P2-3030 A (1005)-105-01.
ORD 7640 P11-3030 A (1005)-105-01.

(S) L. H. CAMPBELL, Jr.,
L. H. Campbell, Jr.,
Brig. Gen., U. S. Army.

This contract is authorized by the Act of July 2, 1940 (Public No. 703, 76th Congress).

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COST-PLUS-A-FIXED-FEE EQUIPPING LEASE OF GOVERNMENT OWNED EQUIPMENT AND FIXED-PRICE (LUMP SUM) SUPPLY CONTRACT

This Contract, entered into this 30th day of October 1940, by The United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and Mesta Machine Company of the City of Pittsburgh, in the State of Pennsylvania, hereinafter called the Contractor, witnesseth that:

75a Whereas, the Government desires to have the Contractor, as an independent Contractor, produce or procure and install in the Contractor's plant on a cost-plus-a-fixed-fee basis, equipment necessary for the partial manufacture, in conjunction

with the Contractor-owned facilities, of Guns, * * * complete; and

Whereas, the Government desires to lease the Government-owned equipment to the Contractor; and

Whereas the Government desires to purchase on a fixed-price (lump sum) basis, Guns, * * * complete, manufactured in the Contractor's plant; and

Whereas the accomplishment of the above-described work by means of a contract after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas as a result of such negotiations the Secretary of War has directed that the Government enter into such a contract with the Contractor, for the accomplishment of the above-described work;

Now, therefore, the parties hereto do mutually agree as follows:

TITLE I

PRODUCTION OR PROCUREMENT AND INSTALLATION OF EQUIPMENT

Article I-A—Statement of Work

1. The Contractor shall as an independent contractor and not as an agent of the Government, in the shortest reasonable time on a cost-plus-a-fixed-fee basis:

76a (a) Purchase or produce the machinery and the special equipment therefor, set forth in Schedule "A," which is attached hereto and specifically made a part hereof;

(b) Purchase or produce the special jigs, fixtures, tools, gages, etc., set forth in Schedule "B," which is attached hereto and specifically made a part hereof;

(c) Purchase or produce the miscellaneous factory equipment set forth in Schdule "C," which is attached hereto and specifically made a part hereof;

(d) Install, or cause to be installed, in the Contractor's plant at West Homestead, Pennsylvania (hereinafter called the Contractor's plant), the equipment set forth in said Schedules "A," "B," and "C," to the extent that installation is necessary;

2. Such work and services to be performed by the Contractor shall be subject in all respects to the supervision, direction, and instructions of the Contracting Officer.

Article I-B—Estimates

It is estimated that the total cost of the work covered by this Title I will be approximately * * * Dollars ($ * * *)

exclusive of the Contractor's fee, and that the work herein contracted for will be ready for utilization by the Government within six (6) months from the date of this contract. It is expressly understood, however, that the Contractor does not guarantee the correctness of either of these estimates. The estimated total cost set forth above is based upon a detailed estimate agreed to by both the Government and the Contractor, a copy of which is on file in the office of the Chief of Ordnance.

77a

Article I–C—Consideration

In consideration for its undertaking under this Title I, the Government shall pay to the Contractor the following:

(a) Reimbursement for expenditures as provided in Article I–D hereof.

(b) A fixed fee in the amount of One Dollar ($1.00).

which shall constitute complete compensation for the Contractor's profit under this Title I.

Article I–D—Reimbursement for Contractor's Expenditures Under Title I

1. The Contractor shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work under this Title I as may be approved or ratified by the Contracting Officer and as are included in the following items:

(a) All labor, material, tools, machinery, equipment, supplies, services, power, and fuel necessary for either temporary or permanent use for the benefit of the work under Title I.

(b) All subcontracts made in accordance with the provisions of this agreement.

(c) Transportation charges (including loading and unloading) on materials, supplies, and equipment.

(d) Premiums on such bonds and insurance policies as the Contracting Officer may require for the protection of the Government; the cost of all public liability, employer's liability, workmen's compensation, fidelity, fire, theft, burglary, and other

78a insurance that the Contracting Officer may approve as reasonably necessary for the protection of the Contractor.

(e) Losses and expenses, not compensated by insurance or otherwise (including settlements made with the written consent of the Contracting Officer), actually sustained by the Contractor in connection with the work and found and certified by the Contracting Officer to be just and reasonable.

(f) The cost of reconstructing and replacing any of the work destroyed or damaged, and not covered by insurance, but expenditures under this item must have the written authorization of the Contracting Officer in advance.

(g) Payments from his own funds made by the Contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used, including those owned by the Contractor.

(h) Such other items as should, in the opinion of the Contracting Officer, be included in the cost of the work. When such an item is allowed by the Contracting Officer, it shall be specifically certified as being allowed under this paragraph.

(i) General administrative and other general expenses of the Contractor (other than expenses of the Contractor which are covered by other Items of this Section 1 of Article I–D) deemed
79a for the purpose of this contract to be incident to the work under this Title I, in the amount of Eighty Thousand Dollars ($80,000.00), payable in six equal monthly installments of Thirteen Thousand Three Hundred Thirty-three Dolars ($13,333.33) and thirty-three cents, the first installment to be paid one month after the date of execution of this contract.

2. The Government reserves the right to furnish any equipment or materials necessary for the completion of the work under this Title I upon so notifying the Contractor prior to any commitment by the Contractor therefor. In the work under this Title I, the Contractor shall be free (but shall not be obligated) to use any equipment and materials of its own manufacture, upon advising the Government in advance as to the prices at which and the conditions upon which such materials will be supplied. In the event the Government is able to obtain equipment or material of equal quality and quantity at a lower price or on more favorable conditions from any responsible competitive source or from its own manufacture, it may undertake to do so by so informing the Contractor within ten (10) days after being advised of the Contractor's price for such material.

3. The Government reserves the right to pay directly to common carriers any or all freight charges on equipment, materials, and supplies.

4. The Government reserves the right to pay directly to the persons concerned all sums due from the Contractor for labor, materials, or other charges.

5. No salaries of the Contractor's executive officers, no
80a part of the expense incurred in conducting the Contractor's main office or regularly established branch offices, and no overhead expenses of any kind, except as specifically authorized in section 1 of this Article I–D, shall be included in the cost of the work; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

6. The Contractor shall, to the extent of his ability, take all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and bonifications, and when unable to take advantage of such benefits it shall promptly notify the Contracting Officer to that effect and the reason therefor. In determining the actual net cost of articles and materials of every kind required for the purpose of this contract there shall be deducted from the gross cost thereof all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and bonifications which have accrued to the benefit of the Contractor or would have so accrued except for the fault or neglect of the Contractor. Such benefits lost through no fault or neglect on the part of the Contractor, or lost through fault of the Government, shall not be deducted from gross costs.

Article I–E—Payments

1. Reimbursement for Cost.

The Government will currently reimburse the Contractor for expenditures made in accordance with Article I–D upon certification to and verification by the Contracting Officer of the original signed pay rolls for labor, the original paid invoices for materials, or other original papers. Generally,
81a reimbursement will be made weekly but may be made at more frequent intervals if the conditions so warrant.

2. Payment of the Fixed-Fee.

The fixed-fee of One Dollar ($1.00) prescribed in Article I–C shall be compensation in full for the Contractor's profit under Title I and shall be paid to the Contractor upon completion and acceptance of the work provided for in this Title I.

3. Payments by Contractor.

If bills for purchase of material, machinery or equipment, or pay rolls covering employment of laborers or mechanics incurred by the Contractor or by any subcontractor under this Title I are not promptly paid by the Contractor or subcontractor as the case may be, the Contracting Officer may, in his discretion, withhold from payments otherwise due the Contractor an amount equivalent to the amount of any such bill or pay roll. Should the Contractor neglect or refuse to pay such bills or pay rolls or to direct any subcontractor to pay such bills or pay rolls within five

(5) days after notice from the Contracting Officer so to do, the Government shall have the right to pay such bills or pay rolls directly.

4. Final payment.

Upon completion of the work under this Title I and its final acceptance in writing by the Contracting Officer, the Government shall pay to the Contractor the unpaid balance of the cost of the work determined under Article I–D hereof, and of
82a the fee, less any sum that may be necessary to settle any unsettled claims for labor or material, or any claim the Government may have against the Contractor. The Contracting Officer shall act upon the acceptance of the completed work with reasonable promptness. The Contractor shall, if required, furnish the Government with a release of all claims against the Government arising under and by virtue of Title I of this contract other than such claims, if any, as may be specifically excepted by the Contractor from the operation of the release in stated amounts to be set forth therein.

Article I–F—Records and Accounts—Inspection and Audit

1. The Contractor agrees to keep records and books of account, on a recognized cost-accounting basis, showing the actual cost to him of all items of labor, materials, equipment, supplies, services, and other expenditures of whatever nature for which reimbursement is authorized under the provisions of Title I of this contract. The system of accounting to be employed by the Contractor shall be such as is satisfactory to the Contracting Officer.

2. The Contracting Officer shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the premises, work and materials, to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the Contractor pertaining to said work; and the Contractor shall preserve for a period of 3 years after completion or termination of this contract,
83a all the books, records, and other papers herein mentioned.

3. Any duly authorized representative of the Contractor shall be accorded the privilege of examining the books, records, and papers of the Contracting Officer relating to the cost of the work for the purpose of checking up and verifying such cost.

Article I–G—Special Requirements Applicable to Title I

1. The Contractor hereby agrees that it will:

(a) Procure and thereafter maintain such bonds and insurance in such forms and in such amounts and for such periods of time as the Contracting Officer may approve or require.

(b) Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State, Territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority.

(c) Unless this provision is waived in writing by the Contracting Officer, reduce to writing every contract in excess of two thousand dollars ($2,000.00) made by it for the purpose of the work under this Title I for services, materials, supplies, machinery, or equipment or for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in its own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchases in excess of $500.00 shall be made or placed without the approval of the Contracting Officer.

84a (d) Enter into no subcontract for any portion of the work under this Title I without the written approval of the Contracting Officer. Subcontracts are defined as contracts entered into by the Contractor with others which involve the performance, wholly or in part at the site of the work, of some part of the work described in Title I hereof.

(e) At all times during the progress of the work keep at the site thereof a duly appointed and qualified representative who shall receive on the part of the Contractor such notices, directions, and instructions as the Contracting Officer may give.

(f) The Contracting Officer may require the Contractor to dismiss from the work such employee as the Contracting Officer deems incompetent, careless, insubordinate, or otherwise objectionable.

(g) At all times use its best efforts in all acts hereunder to protect and subserve the interest of the Government.

Article I-H—Title

The title to all work under this Title I, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment, and supplies, for which the Contractor shall be entitled to be reimbursed under this Title I shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract.

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Article I–I—Materials and Workmanship

1. The work shall be executed in the best and most workmanlike manner by qualified, careful, and efficient workers, in strict conformity with the best standard practices.

2. Except it be otherwise authorized by the Contracting Officer, all materials shall be of the best quality of their respective kinds. If the Contracting Officer requires that the Contractor submit for prior approval samples of materials proposed for use in the work covered by this contract, the Contractor shall make no commitments for such materials until the submitted samples have been approved by the Contracting Officer.

Article I–J—Changes

The Contracting Officer may, at any time, by a written order and without notice to the sureties, require additional work, or direct and omission of work covered by this Title I. If such changes cause a material increase or decrease in the amount of or character of the work to be done under this contract, or in the time required for its performance, an equitable adjustment of the amount to be paid to the Contractor shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this Article must be asserted within 30 days from the date the change is ordered: Provided, however, that the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and with the approval of

86a the Chief of Branch, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article IV–H hereof.

But nothing provided in this Article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

Article I–K—Termination of Contract by Government

1. Should the Contractor at any time refuse, neglect, or fail to prosecute the work under this Title I with promptness and diligence, or default in the performance of any of the agreements therein contained, or should conditions arise which make it advisable or necessary in the interest of the Government to cease work under Title I of this contract, the Government may terminate this contract by a notice in writing from the Contracting Officer to the Contractor. Such termination shall be effective in the manner and upon the date specified in said notice and shall be without prejudice to any claims which the Government may

have against the Contractor or to any claims which the Contractor may have against the Government. Upon receipt of such notice the Contractor shall, unless the notice directs otherwise, immediately discontinue all work and the placing of all orders for materials, facilities, and supplies in connection with performance of this contract and shall proceed to cancel promptly all existing orders and terminate work under all subcontracts insofar as such orders and/or work are chargeable to this contract.

87a 2. If the work under Title I of this contract is terminated for the fault of the Contractor, the Contracting Officer may enter upon the premises and take possession, for the purpose of completing the work contemplated by this contract, of all materials, tools, equipment, and appliances and all options, privileges, and rights, and may complete or employ any other person or persons to complete said work.

3. Upon the termination of this Title I as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of Title I of this contract shall be made as follows:

(a) The Government shall assume and become liable for all obligations, commitments, and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of Title I of this contract; and the Contractor shall, as a condition of receiving the payments mentioned in this Article, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government the rights and benefits of the Contractor under such obligations or commitments.

(b) The Government shall reimburse the Contractor for all expenditures made in accordance with Article I-D and not previously reimbursed.

(c) If this Title I is terminated for the convenience of the Government, the Government shall reimburse the Contractor for such further expenditures after the date of termination for the protection of Government property and for accounting

88a services in connection with the settlement of this contract as the Contracting Officer may approve.

(d) The obligation of the Government to make any of the payments required by this Article, or by paragraph 2, Article I-E of this contract, shall be subject to any unsettled claims for labor or material or any claim the Government may have against the Contractor.

Title II

LEASE OF GOVERNMENT-OWNED EQUIPMENT

Article II–A—Subject Matter

1. The Government hereby leases to the Contractor the Government-owned equipment, which the Contractor will have installed pursuant to the provisions of Title I hereof.

2. The Contractor shall maintain and keep in repair the Government-owned equipment described in Title I hereof and leased to the Contractor hereby.

Article II–B—Term

1. The term of this lease shall be for the period during which Guns, • • • complete, are manufactured by the Contractor under Title III of this contract or any later supplement or amendment of this contract.

2. For the purpose of expediting the manufacture of Guns, • • • complete, and without rental further than that provided in Article II–C hereof, the Contractor shall be permitted to use, subject to the terms and conditions hereof, as they become available for use, any of the Government-owned
89a equipment covered by Title I hereof, or any manufacturing facilities furnished by the Government, prior to the commencement of the term herein created.

Article II–C—Rental

1. The Contractor agrees to pay to the Government in advance, as rental for the term herein created, the sum of One Dollar ($1.00).

Article II–D—General Terms and Conditions

1. The Contractor shall not use any of the equipment herein leased for any purpose other than the manufacture of Guns, • • • complete, without the prior approval in writing of the Chief of Ordnance or his duly authorized representative, except that the Contractor may use for general purposes such machinery and equipment as is purchased or furnished to supplement its existing facilities.

2. At the commencement of the term of this lease, the Contractor shall take an inventory of the machinery and equipment embraced herein, by Plant wherein same is installed. Said inventory shall be submitted to the Chief of Ordnance or his duly authorized representative for approval, and, upon approval, a copy thereof

shall be attached hereto and become a part hereof, as fully as if originally incorporated herein. At the expiration, termination, or revocation of this lease, a similar inventory shall be prepared and submitted.

3. The Government shall not be responsible for damages to property of the Contractor or for personal injuries to the
90a Contractor's officers, agents, servants, or employees, or other persons (except employees of the Government) on the premises as invitees or licensees of the Contractor, arising from or incident to the use of the equipment herein leased, and the Contractor shall save the Government harmless from any and all such claims.

4. The Chief of Ordnance or his duly authorized representative shall, at all times during the leasehold term, have access to the Plant, and the Contractor's building or buildings, wherein any of the equipment herein leased is situated, for the purpose of inspecting or inventorying the same.

5. The liability of the Contractor for loss, damage, or destruction of the equipment herein leased, or any part thereof, shall be that of a bailee under a mutual benefit bailment.

6. The Contractor shall not remove any of the equipment herein mentioned from the Plant without first obtaining the written consent of the Contracting Officer.

Article II-E—Termination—Disposition of Equipment

In the event of termination of Title III of this contract in accordance with the terms of Article II-K of Title III hereof, or in the event of complete performance of this contract by the Contractor and unless a new contract or contracts satisfactory to the Contractor as to price, delivery schedule, and quantities have been entered into and unless a contract to maintain the equipment in a stand-by condition has been entered into by the Government with the Contractor, the Contractor shall at the expense
91a of the Government within ninety (90) days thereafter remove from the premises of the Contractor and ship by railroad to a point designated by the Contracting Officer all of the equipment leased to the Contractor for the performance of this contract, in good condition subject to fair wear and tear and depreciation.

TITLE III

FIXED-PRICE (LUMP-SUM) SUPPLY

Article III–A—Quantities

1. The Contractor shall furnish and deliver * * * Guns, * * * complete, in strict accordance with the specifications, schedules, and drawings, all of which are listed in a part of Drawing Number * * *, revised to include * * *. The term "complete" as used in the contract in connection with the description of the gun to be supplied by the contract, shall mean complete within the use of that term in the applicable specifications, schedules, and drawings.

2. The Government shall deliver to the Contractor at the time of execution of this contract copies of the above Drawing Number * * * and drawings and specifications listed thereon, which will be identified by the signatures of the parties appearing on the copies thereof in the office of the Chief of Ordnance.

3. The Government will furnish to the Contractor f. o. b. Contractor's plant, at the price which the Government actually paid for the forgings, fifty-six tube forgings.

92a 4. Tubes for all of the guns will be shipped by the Contractor to the Watervliet Arsenal for cold working. There will be no charge for the cold working. However the Contractor shall pay the freight from its plant to Watervliet Arsenal and return. The Contractor shall allow two weeks for cold working.

Article III–B—Changes

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings or specifications, except Federal Specifications. Changes as to shipment and packing of all supplies may also be made as above provided. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the Secretary of War or his duly authorized representative. Any claim for adjustment under this article must be asserted within 30 days from the date the change is ordered, provided, however, that the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the Secretary of War or his duly authorized representative, adjust

any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as
93a provided in Article IV–H of Title IV hereof. But nothing provided in this Article shall excuse the Contractor from proceeding with the contract as changed.

Article III–C—Deliveries

1. The guns shall be delivered f. o. b. public carrier, at plant of manufacture for shipment, as directed by the Government, such deliveries to be made according to the approximate schedule (appended hereto as Schedule D) which is not guaranteed by the Contractor, but all deliveries shall be completed by * * *.

2. The Contractor reserves the right to anticipate deliveries.

3. The Contractor shall not be deemed to be in default in his obligations to make delivery as provided in this Title III, provided when and to the extent that the Contractor shows that such delivery was prevented or delayed by failure of suppliers of machine tools or other equipment to deliver on dates now promised, by force majeure as hereinafter defined, or by strikes in the plant of the Contractor. Force majeure is defined as follows:

(a) Civil war, riots, or insurrections in the United States;

(b) Any law, proclamation, ordinance, or regulation of the Government or of any State in which the performance of this Title III of this contract is carried on by the Contractor or by suppliers of the Contractor. Any such law, proclamation, ordinance, or regulation shall be deemed to have been passed, made or promulgated with due authority and powers;

94a (c) Floods, fires, explosions, or other catastrophe or serious accident;

(d) Epidemics or quarantine restrictions;

(e) Any labor trouble in the plants of the suppliers of the Contractor causing cessation or interruption of the work and delaying delivery of materials to the Contractor or the inability or failure of the suppliers of the Contractor to deliver materials to the Contractor.

Without limitation by enumeration of the foregoing, any other cause duly established emanating either from the Government or its representatives or from events which cannot be foreseen and independent of the will of the Contractor and which cause would result either in delaying or preventing execution by the Contractor of its obligations.

4. The Contractor promptly, after it shall have discovered the existence of any cause of delay, shall notify the Government in writing of the existence of such cause and whether or not it

contends that any delay resulting from such cause will be excusable under the provisions of this Article and the extent or anticipated extent of such delay.

Article III–D–Prices

1. The Government will pay to the Contractor for each Gun, * * * complete, manufactured in accordance with the drawing number referred to in Article III–A, delivered to the Government and accepted by it in accordance with the provisions of Title III of this contract, the sum of * * * Dollars ($ * * *) per Gun.

95a 2. The prices quoted in Section 1 of this Article III–D exclude any charge for equipment, which is leased to the Contractor by the Government in accordance with Title II, hereof.

Article III–E—Price Adjustments

1. Taxes.

(a) Federal taxes.—The contract prices, as stated in Article III–D herein, include any Federal tax imposed by the Congress, prior to the date of this contract, which is applicable to the guns purchased herein. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date of this contract and made applicable directly upon the production, manufacture, or sale of the guns covered by this contract, and are paid to the Government by the Contractor on said guns herein contracted for, then the prices quoted in Article III–D of this contract will be increased or decreased accordingly, and any amount due the Contractor as a result of such change shall be charged to the Government and entered on vouchers (or invoices) as separate items. The prices quoted herein do not include any Federal taxes from which exemption is granted, or as to which a credit or refund is provided for under the provisions of section 401 of the Revenue Act of 1935 (Act of August 30, 1935; 49 Stat. 1014, 1025–1026) as amended.

(b) State, County, and Municipal Taxes.—The contract prices as stated in Article III–D herein do not include any tax imposed by any state, county, or municipality upon the trans-

96a action of this purchase of guns. The Government shall not be liable, directly or indirectly, for the payment of any such taxes, except that if the Contractor after using every effort short of litigation to procure exemption or refund, as the case may be, should be compelled to pay to any state, county or municipality, any tax upon the transaction of this procurement,

an amount equal to the tax so paid shall be paid by the Government on demand of the Contractor, in addition to the prices herein stated.

2. Labor.

The contract prices stated in Article III–D are subject to adjustments for changes in labor costs, such changes involving increases or decreases in said contract prices to be determined in accordance with the following method: Provided, however, when the expenditures made under this contract reach the total contract price under Title III prior to completion of performance and available appropriations are exhausted, the Government shall have the right, without further liability, to terminate the contract.

(a) The proportion of the contract price under Title III represented by direct labor is accepted as 65% of the contract price under Article III–D.

(b) Average hourly earnings in all manufacturing industries (durable goods), compiled by the United States Department of Labor, Bureau of Labor Statistics, will be obtained by the War Department for each month of the contract period under Title III and calculations will be made of the rates of change
97a of such average hourly earnings for each month in comparison with the average hourly earnings for the month of * * * as a base. The rate of change for each month will be applied to the proportion of the contract price under Title III represented by direct labor as given in item (a) above and the results will be applied as an increase or decrease in the contract price of all guns delivered and accepted during the following month.

(c) The proportion of the contract price under Title III represented by direct labor used as a basis for the determination of increase or decrease in direct labor cost for each month will be that determined in item (a) above whether or not the actual direct labor cost expended by the contractor is above or below that proportion.

3. General.

(a) For the purpose of determining increases or decreases in contract prices, under Title III, rates of changes in average hourly earnings will be calculated to the nearest one-tenth of one percent.

(b) Payment for increases, or deductions for decreases in contract prices, under Title III, resulting from the above, will be deferred until performance under this contract is completed: Provided, however, That the War Department may make partial payments on account of such increases as may accrue from time to time, subject to such requirements as a condition precedent to such payments as the War Department may prescribe.

(c) The War Department reserves the right to substitute for the index for labor or material any other method or index should it at any time, in the judgment of the War Department,
98a appear that the specified indices do not reflect satisfactorily the increases or decreases in costs of material or labor under the contract.

Article III–F—Payments

The Contractor shall be paid, upon the submission of properly certified invoices or vouchers, the prices stipulated herein for articles delivered and accepted or services rendered, less deductions, if any, as herein provided. Unless otherwise specified, payments will be made on partial deliveries accepted by the Government.

Article III–G—Partial Payments

1. Partial payments.—The Contracting Officer may, from time to time, authorize partial payments to the Contractor upon property acquired and/or produced by it for the performance of Title III of this contract: Provided, That such partial payments shall not exceed 75 percent of the cost to the contractor of the property upon which payment is made, which cost shall be determined from evidence submitted by the contractor and which must be such as is satisfactory to the contracting officer: Provided further, That provision is not otherwise made in this contract for such partial payments.

2. Title to Property Where Partial Payments are Made.—The title to all property upon which any partial payment is made prior to the completion of Title III of this contract shall vest in the Government in its then condition forthwith upon the making of any such partial payment or payments: Provided, how-
99a ever, That nothing herein shall deprive the contractor of any further partial or final payments due or to become due hereunder; nor relieve the contractor and/or the Government of any of their respective rights or obligations under Title III of this contract.

3. Title to Property Where Partial Payments are Made and Default Occurs.—The Contractor agrees that in case of default by it in the performance of Title III of this contract or of other termination thereof before completion, such default or other termination shall ipso facto operate to vest in the Government title to all property acquired and/or produced by the Contractor for the performance of Title III of this contract, the title to which has not been previously vested in the Government under the provisions of Title III of this contract: Provided, That the provi-

sions of this section shall not be operative unless at least one partial payment has been made under Title III of this contract.

4. Fire Insurance.—The Contractor agrees to insure against fire all property in its possession upon which a partial payment is about to be made, such insurance to be in a sum at least equal to the amount of such payment plus all other partial payments, if any, theretofore made thereon, and further agrees to keep such property so insured, free of cost to the Government, until the same is delivered to the Government. Such property is to be considered as delivered to the Government upon its final acceptance. Such insurance policy or policies shall be taken out with a company or companies satisfactory to the Contracting Officer and shall provide that loss, if any, shall be payable to the Contractor and the Government as their respective interests may ap-
100a pear. All such policies shall be filed with the Contracting Officer and shall be subject to his approval as to form and substance.

5. Bonds.—Under the provisions of the Act of August 24, 1935 (49 Stat. 703; 40 U. S. C. 270a), the Contractor shall furnish at the time of execution of this contract an acceptable performance bond on United States Standard Form No. 25 in the amount of ten percent (10%) of the total contract price stated in Title III hereof and an acceptable payment bond on United States Standard Form No. 25-A in the amount of * * * Dollars ($ * * *).

Article III-H—Inspection

1. All material and workmanship shall be subject to inspection and test at all times and places, and, when practicable, during manufacture. In case any articles are found to be defective in material or workmanship, or otherwise not in conformity with the specification requirements, the Government shall have the right to reject such articles, or require their correction. If the Contractor fails to proceed promptly with the replacement and/or correction thereof, the Government may, by contract or otherwise, replace and/or correct such articles and charge to the Contractor the excess cost occasioned the Government thereby.

2. If inspection and test, whether preliminary or final, is made on the premises of the Contractor or Sub-Contractor the Contractor shall furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient inspections and tests required by the inspectors in the performance of their duty. All inspections and tests by the Government shall
101a be performed in such manner as not to unduly delay the work. Special and performance tests shall be as described

in the specifications. The Government reserves the right to charge to the Contractor any additional cost of inspection and test when articles are not ready at the time inspection is requested by the Contractor.

3. Final inspection and acceptance of materials and finished articles will be made at the plant of manufacture prior to delivery. Final inspection shall be conclusive except as regard fraud, or such gross mistakes as amount to fraud. Final inspection and acceptance or rejection of the materials or supplies shall be made as promptly as practicable, but failure to inspect and accept or reject materials or supplies shall not impose liability on the Government for such materials or supplies as are not in accordance with the specifications. In the event public necessity requires the use of guns not conforming to the specifications, payment therefor shall be made at a proper reduction in price.

4. The Contractor shall maintain a satisfactory system of inspection, gaging and gage checking concurrent with manufacture, and no Ordnance materiél shall be submitted for the Inspector's approval which has not previously been inspected by agents of the Contractor and found to be up to the Contract standard.

Article III–I—Progress Reports

The Contractor agrees to furnish the Contracting Officer progress reports as required by him.

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Article III–J—Subcontracts

No Contract shall be made by the Contractor with any other party for furnishing any of the completed or substantially completed articles, or work herein contracted for without the written approval of the Contracting Officer.

Article III–K—Termination of Title III

If, in the opinion of the Contracting Officer upon the approval of the Secretary of War, the best interests of the Government so require, this Title III may be terminated by the Government, even though the Contractor be not in default, by a notice in writing relative thereto from the Contracting Officer to the Contractor. In case such notice be given the Contractor this Title III shall terminate, ipso facto, upon the giving of said notice. Upon such termination the Contractor shall forthwith deliver to the Government f. o. b. Contractor's plant in their then state of completion, all articles, spare parts, drawings, and other information and things called for herein, not previously delivered, and all work in

process, materials, and fabricated parts acquired and/or produced by the Contractor for the performance of this Title III, and the Government shall then forthwith pay the Contractor all amounts, if any, remaining due and unpaid under this Title III for completed articles, spare parts, drawings, and other information and things called for herein, theretofore completed, delivered, and accepted by the Government; and the Government shall also forthwith pay the Contractor for all partially completed articles,
103a spare parts, work in process, materials, fabricated parts, drawings, and other information and things to be so delivered hereunder, an amount to be computed as follows:

(a) There shall be determined by an audit conducted by or for the Contracting Officer, the total net amount of all expenditures and obligations made and/or incurred by the Contractor under this Title III in designing, manufacturing, and delivering said partially completed articles, spare parts, work in process, materials, fabricated parts, drawings, and other information and things so delivered hereunder.

(b) The Contractor and the Contracting Officer shall agree upon an estimate, based on the foregoing audit and any other pertinent data, of the net cost to the Contractor of fully completing and delivering said partially completed articles, spare parts, drawings, and other information and things called for herein, all in accordance with the requirements of this Title III had it not been terminated, including in such estimate all cost previously incurred under this Title III in designing and manufacturing said partially completed articles, spare parts, drawings, and other information and things, as well as those costs which would be required in the future for the entire completion and delivery thereof. In the event of the failure of the Contractor and the Contracting Officer to arrive promptly at such an agreement, said estimate shall be determined in the manner provided in Article IV–H of Title IV hereof for the adjustment of claims and disputes.

(c) The percentage which the foregoing item (a) is of item (b) shall then be determined and a sum of money equal to that
104a same percentage of the total contract price under this Title III (plus or minus any additions or deductions for changes), of such partially completed articles, spare parts, drawings, and other information and things, had they been completed, delivered, and accepted in accordance with the terms of this Title III, shall then be computed.

(d) The total of all payments, if any, previously made to the Contractor on account of such partially completed articles, spare parts, drawings, and other information and things, shall then be ascertained.

(e) The Contractor shall then be paid the same sum of money computed in accordance with (c) above, less the total of item (d).

Upon the making of said payments all obligations of the Government to make further payments or to carry out other undertakings hereunder shall cease forthwith and forever, except that all rights and obligations of the respective parties under the articles, if any, of this Title III applicable to Patent Infringements and Reproduction Rights shall remain in full force and effect.

Article III-L—Responsibility for Supplies Tendered

The Contractor shall be responsible for the articles or materials covered by this Title III until they are delivered at the designated point, but the Contractor shall bear all risk on rejected articles or materials after notice of rejection. Where final inspection is at point of origin but delivery by Contractor is at some other point, the Contractor's responsibility shall continue until delivery is accomplished.

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Title IV

Additional Provisions Relating to Entire Contract

Article IV-A—Walsh-Healey Act

1. The following representations and stipulations pursuant to the Walsh-Healey Public Contracts Act (Act of June 30, 1936; 49 Stat. 2036; 41 U. S. C. 35–45), shall apply to the work under this contract:

"(a) The Contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.

"(b) All persons employed by the Contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the Contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the Contract; provided, however, that this stipulation with respect to minimum wages shall apply only to purchases or Contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

"(c) No person employed by the Contractor in the man-
106a ufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the Contract shall be permitted to work in excess of 8 hours in any 1 day or in excess

of 40 hours in any 1 week, unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor.

"(d) No male person under 16 years of age and no female person under 18 years of age and no convict labor will be employed by the Contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in the Contract.

"(e) No part of the Contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said Contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the Contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima facie evidence of compliance with this subsection.

"(f) Any breach or violation of any of the foregoing representations and stipulations shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of the contract, in the sum of $10 per day for each male person under 16 years of age or each female person under 18 years of age, or each convict laborer knowingly employed in the performance of the contract, and a sum equal to the amount of any deductions, rebates, refunds, or under payment of wages due to any employee engaged in the performance of the contract; and, in addition, the agency of the United States entering into the contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of the contract as set forth herein may be withheld from any amounts due on the contract or may be recovered in a suit brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: Provided, That no claims by employees for such payments shall be entertained unless made within 1 year from the date of actual notice to the Contractor of the Withholding or recovery of such sums by the United States of America.

107a

"(g) The Contractor shall post a copy of the stipulations in a prominent and readily accessible place at the site of the Contract work and shall keep such employment records as are required in the Regulations under the act available for inspection
108a by authorized representatives of the Secretary of Labor.

"(h) The foregoing stipulations shall be deemed inoperative if this contract is for a definite amount not in excess of $10,000."

2. Stipulation (b) of "Representations and Stipulations pursuant to the Act of June 30, 1936," with respect to wages, is inoperative due to lack of determination by the Secretary of Labor of prevailing minimum wage rates for the industry involved.

Article IV-B—Preference for Domestic Articles

1. In the performance of the work covered by this contract the Contractor, subcontractors, materialmen or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured, as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the department under the proviso of Title III, section 3, of the Act of March 3, 1933; 47 Stat. 1520 (U. S. Code, Title 41, section 10b).

109a 2. Inasmuch as the materials listed below or the materials from which they are made are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of satisfactory qualities, their use in the work herein specified is hereby authorized without regard to the country of origin:

Asbestos	Nickel
Balsa Wood	Nickel Alloy (Monel Metal)
China Wood Oil (Tung Oil)	Platinum
Chromium	Rubber
Cork	Silk
Jute	Sisal
Kaurigum	Teak Wood
Lac	Tin

Articles, materials, or supplies made in the United States and containing mercury, antimony, tungsten, or mica of foreign origin may be used (subject to the requirements of applicable specifications) in the work herein specified, if such manufactured articles, materials, or supplies have been made in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States.

Article IV-C—Convict Labor

The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article IV-D—Workmen's Compensation Laws

The Act of June 25, 1936 (49 Stat. 1938, 1939; 40 U. S. C. 290) provides that the several States have authority to make their workmen's compensation laws applicable to contracts for the construction, alteration, or repair of a public building or public
110a work of the United States, and the several States are vested with the power and authority to enforce such State laws on lands of the United States.

Article IV-E—Accident Prevention

The Contractor shall at all times exercise reasonable precautions for the safety of employees on the work and shall comply with all applicable provisions of Federal, local, State, and municipal safety laws and building and construction codes.

Article IV-F—Officials Not To Benefit

No member of or Delegate to Congress, or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article IV-G—Covenant Against Contingent Fees

The Contractor warrants that it has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or in its discretion, to deduct from payments due the Contractor the amount of such commission, percentage, brokerage, or contingent fee. This warranty shall not apply to com-

missions payable by Contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

111a

Article IV-H—Disputes

Except as otherwise specifically provided herein, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer, subject to written appeal by the Contractor within 30 days to the Chief of Branch concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto, when the amount involved is $15,000.00 or less. When the amount involved is more than $15,000.00, the decision of the Chief of Branch shall be subject to written appeal within 30 days by the Contractor to the Secretary of War or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the Contractor shall diligently proceed with the work as directed.

Article IV-I—Approval Required

This contract shall be subject to the written approval of The Secretary of War and shall not be binding until so approved.

Article IV-J—Definitions

1. The term "Chief of Branch" refers to the Chief of Ordnance.

2. The terms "The Secretary of War" or "Chief of Branch," shall include their duly authorized representatives as the case may be, other than the Contracting Officer.

3. Except for the original signing of this contract, the term "Contracting Officer" as herein shall include his duly appointed successor or his authorized representative.

112a

Article IV-K—Alterations

The following changes were made in this contract before it was signed by the parties hereto:

1. Last line Page 5, Paragraph (i) Section 1 of Article I-D delete "Thirteen Thousand Three Hundred Thirty-three Dollars ($13,333.00)." Substitute therefore "Eighty Thousand Dollars ($80,000.00)."

2. First line Page 6, Paragraph (i) Section 1 of Article I-D, after the word "installment" and before comma, insert "of Thirteen Thousand Three Hundred Thirty-three Dollars ($13,333.33) and thirty-three cents."

3. Sixth line, Article I-J, Page 9, delete "of the fixed fee."

4. Third line, page 16, insert word, * * * in blank space.

In witness whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

THE UNITED STATES OF AMERICA.

Approval recommended:

By (s) L. H. CAMPBELL, Jr.,
L. H. Campbell, Jr.,

October 31, 1940.
Brig. Gen. U. S. Army (Contracting Officer).

(s) C. M. WESSON,
C. M. Wesson,
Major General,
Chief of Ordnance.

113a

MESTA MACHINE COMPANY,
(Contractor)

By (S) LORENZ IVERSEN, *President,*
Pittsburgh, Pennsylvania.
(Business Address)

Two Witnesses as to Execution by the Contractor:

/s/ CHAS. RAISIG,
Coraopolis, Pa.
(Address)

/s/ L. W. MESTA,
Pittsburgh, Pa.
(Address)

Approved Nov. 1, 1940.
By direction of the Secretary of War.

(S) ROBERT P. PATTERSON,
The Assistant Secretary of War.

I, J. M. Hutchison, certify that I am the Secretary of the Corporation named as Contractor herein: that Lorenz Iverson who signed this contracton behalf of the Contractor was then President of said Corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL] (S) J. M. HUTCHISON.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, Lorenz Iversen, who signed this contract for the Mesta Machine Company had authority to

execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

(S) L. H. CAMPBELL, Jr.,
L. H. Campbell, Jr.,
Brig. Gen., U. S. Army,
Contracting Officer.

114a SCHEDULES A, B, C AND D

Include inter alia Machinery included in

Exhibit C. (p. 63a)

* * * * *

Contract No. W-ORD-486
Supplement 1

SUPPLEMENT TO COST-PLUS-A-FIXED-FEE EQUIPTING LEASE OF GOVERNMENT-OWNED EQUIPMENT AND FIXED-PRICE (LUMP-SUM) SUPPLY CONTRACT, WAR DEPARTMENT

Contractor: Mesta Machine Company, Pittsburgh, Pennsylvania

Contract for: Supplemental contract for the purpose of expediting the performance of the work under the principal contract through permitting the Contractor to rebuild, recondition, or adapt equipment, and to use equipment of its own manufacture upon terms satisfactory to the Contractor and the Government.

Place: West Homestead, Pennsylvania.

Estimated Cost of Equipping: Unchanged by this Supplement.

Payments to be made by and to the Finance Officer, U. S. Army, at Philadelphia, Pennsylvania.

115a The equipment, supplies, and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to, the following Procurement Authorities, the available balances of which are sufficient to cover the cost of same.

ORD 7404 P 99 A 0141-01.
NG 15416 P 57-3030 A 1405-01.
ORD 7640 P2-3030 A (1005)-105-01.
ORD 7640 P11-3030 A (1005)-105-01.

(s) L. H. CAMPBELL, Jr.
L. H. Campbell, Jr.,
Brig. Gen., U. S. Army.

This supplemental contract is authorized by the Act of July 2, 1940 (Public No. 703, 76th Congress).

SUPPLEMENTAL CONTRACT

This Supplemental Contract, entered into this 21st day of February 1941, by and between The United States of America, hereinafter called "the Government", represented by the Contracting Officer executing this contract and Mesta Machine Company of the city of Pittsburgh, the state of Pennsylvania, hereinafter called "the Contractor," witnesseth that:

Whereas, there is now in force between the parties hereto a certain contract which provides for the equipping of the Contractor's plant; the lease of Government-owned equipment; and the manufacture of guns, * * * said contract, bearing the
116a date of October 30, 1940, being further identified by the Government as "Contract No. W-ORD-486"; and

Whereas, the Government in the interest of National Defense, desires to expedite installation of equipment and production under the said contract; and

Whereas, in the equipping of the Contractor's plant under the terms of said contract, the Contractor is free but is not obligated to use any equipment or materials of its own manufacture if such equipment can be purchased by the Contractor; and

Whereas, said contract provides in effect that if the Contractor undertakes to furnish any materials or equipment of its own manufacture (despite the absence of obligation on its part under the contract so to do), it may be paid by the Government therefor no more than its actual expenditures as approved by the Contracting Officer and without profit other than that contained in the fixed-fee of $1.00 provided for the purchase or production and installation of all equipment; and

Whereas, the Contractor has expressed unwillingness to produce for or offer to the Government equipment or material of its own manufacture (although the same be available in Contractor's plant) under such terms and conditions in those cases where such equipment and materials suitable for use can be purchased; and

Whereas, the said contract does not expressly provide for the rebuilding, reconditioning, or adaptation of any machine tools, machinery, or equipment, including equipment furnished by the Government under the right reserved by it in said contract; and
117a Whereas the Contractor has expressed willingness to produce, rebuild, recondition or adapt materials and equipment in its own plant if it is permitted to do so upon the quo-

tation of prices which may include a profit to the Contractor, such prices to be subject however to the acceptance and approval by the Contracting Officer; and

Whereas the producing, rebuilding, reconditioning, or adapting of equipment and materials in the Contractor's own plant will result in the completion of the equipping of the plant in a substantially shorter period of time than would be possible if the Contractor purchased the equipment from others; and

Whereas it is in the interest of the Government to accomplish such a result; and

Whereas it has been determined to be in the interest of the Government to require the Contractor to cancel certain equipment orders placed by it with Government approval subsequent to the execution of said contract; and

Whereas in connection with satisfying such requirement of the Government the Contractor may be subjected to cancellation charges which should be provided for expressly in said contract; and

Whereas the accomplishment of such work under a contract entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law;

Now, therefore, the parties hereto do mutually agree that the said contract of October 30, 1940, shall be and is hereby modified in the following particulars:

1. Change Paragraph (b), Article I–C (page 4) to read:

118a (b) A fixed-fee in the amount of one dollar ($1.00), which shall constitute complete compensation for the Contractor's profit under this Title I, except such profit as may be included in Contractor's prices quoted under the provisions of Section 2, Article I–D as changed by this supplemental contract.

2. Change Paragraph (e), Article I–D (page 5) to read:

Losses and expenses not compensated by insurance or otherwise (including settlements made with the written consent of the Contracing Officer), actually sustained by the Contractor in connection with the work and found and certified by the Contracting Officer to be just and reasonable, including such charges as may be made to the Contractor because of its cancellation of orders for materials or equipment pursuant to written order of the Contracting Officer in accordance with Article I–J.

3. Change Section 2 of Article I–D (page 6) to read:

The Government reserves the right to furnish any equipment or materials for the completion of the work under this Title I upon so notifying the Contractor prior to any commitment by

the Contractor therefor. As soon as practicable the Contractor shall furnish for use in the performance of work under this Title I a Trepanning Lathe of its own manufacture complete with boring bars, cutting heads and holding fixture, provided that the price at which and the conditions upon which such lathe will be furnished are approved by the Contracting Officer. Likewise, in the work under this Title I, the Contractor shall, within
119a the limits of its capacity, furnish any other materials or equipment of its own manufacture which the Contracting Officer may find necessary or desirable to expedite the performance of such work, upon advising the Government in advance of such furnishing as to the prices at which and the conditions upon which such materials or equipment will be supplied. The Contractor shall rebuild, recondition or adapt certain Government-owned equipment furnished to the Contractor under the right reserved herein (including the equipment more particularly described in Schedule "E" which is attached hereto and specifically made a part hereof) provided that the price at which and the conditions upon which such rebuilding, reconditioning or adapting will be done, are approved by the Contracting Officer. The Contractor shall also be free (but shall not be obligated) to rebuild, recondition or adapt any other machine tools, machinery or equipment upon advising the Government in advance as to the prices at which and the conditions upon which such rebuilding, reconditioning or adapting will be done. In any event, the prices referred to in this Section 2 may include a profit to the Contractor and may be quoted without regard to the provisions of Section 5 of this Article I-D. If in any case within the scope of this section, the Government is able to obtain equipment, material or services of equal quality and quantity at a lower price or on more favorable conditions from any responsible competitive source or from its own manufacture, it may undertake to do so by informing the Contractor within ten (10) days after being advised of the Contractor's price for such equipment or material or services.

120a 4. Except as herein provided, the provisions of the said contract of October 30, 1940, shall continue in full force and effect.

5. This supplemental contract shall be subject to the written approval of the Secretary of War and shall not be binding until so approved.

6. The following alterations were made in this contract before it was signed by the parties hereto: None.

In witness whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

THE UNITED STATES OF AMERICA,
By (s) L. H. CAMPBELL, Jr.,
L. H. Campbell, Jr.,
Brig. Gen., U. S. Army.

Approval Recommended February 24, 1941.

_____,
(Contracting Officer).

(s) C. M. WESSON,
C. M. Wesson,
Major General,
Chief of Ordnance.

MESTA MACHINE COMPANY,
(Contractor)
By (s) LORENZ IVERSEN, *President,*
Pittsburgh, Pennsylvania.
(Business Address)

121a Two Witnesses as to Execution by the Contractor:
(S) R. E. SMITH, Jr.,
Ben Avon, Pa.
(Address)
(S) CHAS. RAISIG,
Coraopolis, Pa.
(Address)

Approved Mar. 1, 1941.
By direction of the Secretary of War.
(S) ROBERT P. PATTERSON,
Robert P. Patterson,
Under Secretary of War.

I, J. M. Hutchison, certify that I am the Secretary of the Corporation named as Contractor herein; that Lorenz Iversen who signed this contract on behalf of the Contractor was then President of said Corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL] (S) J. M. HUTCHISON.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, Lorenz Iversen, who signed this contract for the Mesta Machine Company had authority to

execute the same, and is the individual who signs similar
122a contracts on behalf of this corporation with the public generally.

(S) L. H. CAMPBELL, Jr.,
L. H. Campbell, Jr.,
Brig. Gen., U. S. Army,
Contracting Officer.

SCHEDULE "E"

Government-Owned Equipment to be Rebuilt or Reconditioned

Eight (8) Gun Boring Lathes (42" x 60'-0"), identified as follows: Lathe No. WV—307, Lathe No. WV—517, Lathe No. WV—524, Lathe No. WV—867, Lathe No. WV—1876, Lathe No. WV—1948, Lathe No. WV—1949, Lathe No. WV—1958. Two (2) Rifling Machines.

123a *Exhibit 2*

THE AMERICAN TOOL WORKS COMPANY

MANUFACTURERS OF LATHES, RADIAL DRILLS, SHAPERS

Main Office and Works, Cincinnati, U. S. A.

OCTOBER 10, 1940.

MESTA MACHINE CO.,
P. O. Box 1466, Pittsburgh, Pa.
Attention: Mr. J. D. Connolly,
Subject: Gun Boring and Turning Lathes.

GENTLEMEN: Confirming the conversations which have taken place between our respective engineers, we are pleased to quote you f. o. b. cars Pittsburgh on three Gun Boring and Turning Lathes, according to specifications in ditto form attached hereto, the price being $75,000 per lathe.

Terms of payment are to be $5,000 with the order, $5,000 in ninety days and $5,000 in one hundred and eighty days, balance upon delivery.

Trusting we may be favored with your order, we remain
Very truly yours,

THE AMERICAN TOOL WORKS COMPANY,
By L. W. SCOTT ALTER,
President and General Manager.

LWSA/w.
JBC.
file JC.

124a *Exhibit 3*

Office

MESTA MACHINE CO.

Pur Order No. 13651.
S. O. No. 93034.

HOMESTEAD, PA., *Nov. 21, 1940.*

THE AMERICAN TOOL WORKS CO.,
Cincinnati, Ohio.

CR

3—30" Gun Boring and Turning Lathes as per your quotation of October 10, 1940. Price each f. o. b. Homestead, Pa., $75,000.00

3

225,000.00

Delivery—1—January 15, 1941; 1—February 15, 1941; 1—February 25, 1941.

353.

RC.

Approved Under Contract W-ORD-486.

(s) JAMES L. GUION,
James L. Guion,
Lt. Col. Ord. Dept., U. S. A.,
Contracting Officer's Representative.

31271

125a *Exhibit 4*

RECEIVING REPORT

War Department. Q. M. C. Form No. 431. Revised April 6, 1931. RRD—Voucher No. 11301-42. Stock Record Account. No. sheets 1. Sheet No. 1.

Received 6-21-41 by Pittsburgh Ordnance District.

Received from Mesta Machine Company, West Homestead, Pa.

Delivered by x. Car No. x. Seal No. x. Contract No. W-Ord-486.

How purchased: F. o. b.—Destination. P. O. 13651, S. O. 93034.

Govt. B/L No. x. Date x. Contracting office, Chief of Ordnance.

F. o. b. point W. Homestead, Pa. Shipping point W. Homestead, Pa. P/A No. .....

Shipped to Mesta Machine Company, West Homestead, Pa. Payment by Finance Officer at Philadelphia, Pa.

Shipment No. 1, Partial.

126a ARTICLES INSPECTED, ACCEPTED, AND RECEIVED

Number Pkgs.	Quantity	Stock No.	Articles	Unit	Unit cost	Total cost
.....	1	.....	Lathe, American Tool Works combination boring & turning 30". * * * and complete with all electrical equipment. No. 01100.....	.....	.....	$75,000.00

I certify that the articles listed on this report were inspected and accepted by me, and that they conform to the contract requirements; that the articles listed on the back of this report
127a were rejected for the reasons stated, and that the foregoing report is correct.

SCOTT R. DICKINSON,
1st Lt. Ord. Dept.

Date 7-8-41.
Approved:

Date 7-8-41.
JOSEPH E. FINN,
Captain, Ord. Dept.
31271

I certify that the articles listed on this report were received by me in the quantity and condition stated, and that the same have been taken up on the stock record cards of this station.

SAMUEL B. ROTHARMEL,
1st Lt. Ord. Dept., Property Officer.

Date 7-8-41.

Indicate Distribution By Check Opposite Proper Designation

1. Voucher to Stock Record Account.
2. Finance Officer who Pays Account.
3. File with Purchase Record.

128a *Exhibit 5*

THE AMERICAN TOOL WORKS CO.
CINCINNATI, U. S. A.

Customers Ord. No. & Date 13651 11/21/40.
Invoice Date June 7/41.
Invoice No. ------.
Shipper's Order No. ------.
Shipped to Destination, Mesta Machine Co., Homestead, Penna.
Terms, Net Cash.

One 30" Gun Boring & Turning Lathe, as per our quotation of October 10, 1940, $75,000.00.
Emergency Defense Contract.
Please Receipt and Return Today.
The American Tool Works Co.
Paid July 7, 1941.
Per A. C. Nolte.
S. O. 93034.
Vr. 60310.

31271

129a *Exhibit 6*

MESTA MACHINE COMPANY

PITTSBURGH, PA., U. S. A.

Contract No. W-Ord-486, dated 10-30-40.
Refer to Invoice No. 31271.
Invoice Date, June 30, 1941.
Vendor's Nos. 93325-P.
Sold to War Department, James L. Guion, Lt. Col. Ord. Dept. U. S. A., Contracting Officer, Pgh. Ordnance District, 1212 Chamber of Commerce Bldg., Pittsburgh, Pa.
From Homestead, Pa., F. o. b. Our Works.
Terms: per contract. (Quadruplicate.)
Article I-D Reimbursement for Contractor's expenditures under Title I, exclusive of Paragraph (i) of Section 1:
Summary of: Accrued costs for the month of June 1941 applying against Contract W-Ord-486 dated October 30, 1940: Equipment: The American Tool Works Co., P. O. 13651, S. O. 93034, 1 30" Gun Boring & Turning Lathe, $75,000.00.
Goods and/or Service covered by this Invoice were produced in accordance with the Applicable Provisions of the Fair Labor Standards Act of 1938.

130a *Exhibit 7*

War Ordnance, 1202 Chamber of Comm. Bldg., Pittsburgh, Pa., July 10, 1941.
Mesta Machine Company, Pittsburgh, Pa., 1202 Chamber of Comm. Bldg., Pgh. Ord. Dist.
June 30, 1941—Article I-D Reimbursement for contractor's expenditures under Title I, exclusive of paragraph (i) of Section 1:

Summary of accrued costs for the month of June for equipment:

131a For itemized invoice #31271—P. O. 13651 rec. inv. The American Tool Works Co. attchd., $75,000.00; 1st part. payment, $75,000.00.

Mesta Machine Company certified invoice attached.

W. Ord. 486, 10/30/40, $75,000.00, 4.

JOHN D. POTTER,
1st Lt., Ord. Dept., U. S. A.

JOSEPH E. FINN,
Capt., Ord. Dept., Auditor.

210/11005, ORD 7889 P 11-3030 A 1005-01 OS&SA 1940-41, $75,000.00 $75,000.00.

75,000.00

31271

132a *Exhibit 8*

MESTA MACHINE COMPANY
General Office and Works: West Homestead, Pa.
Mail Address, P. O. Box 1466
PITTSBURGH, PA.

DECEMBER 21, 1940.

Colonel JAMES L. GUION, *Executive Officer,*
Pittsburgh Ordnance District,
1212 Chamber of Commerce Building,
Pittsburgh, Pennsylvania.

Subject: Trepanning Lathe

DEAR SIR: Unless otherwise specified, the following terms and conditions will apply: Terms: 80% monthly as the work progresses: 10% upon shipment: balance not later than 60 days after shipment. Prices will remain in effect for 15 days from this date and do not include foundation bolts and washers, electrical equipment, or sales tax. Prices allow published tariff freight rate of this date to the point specified, any change in rate being for buyer's account. Purchaser will pay transportation charges from our plant to destination on such motors as are mounted by us at our works. All deliveries are contingent upon strikes, accidents, delay of carriers, or other causes beyond our control.

In connection with the manufacture of the * * * guns under Ordnance Contract No. W-ORD-486, we have available,

partially completed, a Trepanning Lathe * * * which
133a can be used to advantage. For your approval we are pleased to submit the following quotation on the machine and the required size of the boring tools.

	Price
One (1) Trepanning Lathe, including Motors and Control, not including Boring Bars or Cutting Heads	$46,350.00
Two (2) 14" diameter Boring Bars, including One (1) Set of Cutting Heads and Two (2) Spare Cutting Heads	6,213.00
Two (2) 13⅛" diameter Boring Bars, including One (1) Set of Cutting Heads and Two (2) Spare Cutting Heads	6,020.00
Two (2) 12" diameter Boring Bars, including One (1) Set of Cutting Heads and Two (2) Spare Cutting Heads	5,800.00
Total Price	64,383.00

In addition, there will be required an especially designed holding fixture, and we will submit our quotation on this equipment after the details are completed.

The prices specified are f. o. b. cars our works, West Homestead, Pennsylvania.

(Sheet No. 2)

134a Terms of Payment: Net cash 30 days after completion of the machine.

Very truly yours,

MESTA MACHINE COMPANY,
W. W. POWELL,
General Sales Manager.

WCWilson/rr.

March 28, 1941. Approved under Contract W-ORD-486.

(S) JAMES L. GUION,
James L. Guion,
Lt. Col., Ord. Dept., U. S. A.,
Contracting Officer's Representative.

135a *Exhibit 9*

RECEIVING REPORT

War Department. Q. M. C. Form No. 431. Revised April 6, 1931. Voucher No. RRD 11493-42. Stock Record Account. No. sheets 1. Sheet No. 1.

Received 9-17-41 by Pittsburgh Ordnance District.

Received from Mesta Machine Company, West Homestead, Pa.

Deliver by X. Car No. X. Seal No. X. Contract No. W-ORD-486 Supp. 1.

How purchased: F. o. b.—Origin Mesta Machine Company, Est. 12/31/40.

Govt. B/L No. X. Date X. Contracting office, Chief of Ordnance.

F. o. b. point West Homestead, Pa. Shipping point X.

Shipped to Mesta Machine Company, West Homestead, Pa. Payment by Finance Officer at Philadelphia, Pa.

Shipment No. 1 Final.

136a Articles Inspected, Accepted, and Received

Number pkgs.	Quantity	Stock No.	Articles	Unit	Unit cost	Total cost
.....	1	.....	Lathe, Trepanning	.....	$46,550.00	
.....	2	.....	Bars, boring, 14" dia. w/1 set cutting heads and 2 spare heads	.....	6,213.00	
.....	2	.....	Bars, boring, 13⅛" dia. w/1 set cutting heads and 2 spare heads	.....	6,020.00	
.....	2	.....	Bars, boring, 12" dia. w/1 set of cutting heads and 2 spare heads	.....	5,800.00	
						64,583.00

I certify that the articles listed on this report were in-
137a spected and accepted by me, and that they conform to the contract requirements; that the articles listed on the back of this report were rejected for the reasons stated, and that the foregoing report is correct.

SCOTT R. DICKINSON,
1st Lt., Ord. Dept.

Date 10–17–41.

Date 10–20–41.

Approved:

JOSEPH E. FINN,
Major, Ord. Dept.

I certify that the articles listed on his report were re-
137a ceived by me in the quantity and condition stated, and that the same have been taken up on the stock record cards of this station.

SAMUEL B. ROTHARMEL,
1st Lt., Ord. Dept.,
Property Officer.

Date 10–20–41.

138a *Exhibit 10*

MESTA MACHINE COMPANY

PITTSBURGH, PA., U. S. A.

Customer's Order No. & Date ..... Requisition No. .....
Contract No. W–Ord–486 dated 10–30–40 & Supplement 1 dated

2-21-41. Refer to Invoice No. 32293. Invoice Date Sep. 30, 1941. Vendor's Nos. 93064, 68, 88, 93251, 57–61 incl. —C — 5L.

Sold To War Department, James L. Guion, Lt. Col. Ord. Dept. U. S. A., Contracting Officer, Pgh. Ordnance District, 1212 Chamber of Commerce Bldg., Pittsburgh, Pa.

Shipped to and Destination. Date Shipped: Car Initial and No. From Homestead, Pa. How Shipped and Route. F. O. B. Our Works. Terms: per contract. Prepaid or Collect? (Quadruplicate.)

Quantity	Description	Weight	Price	Extension	Amount
	Supplement 1 to Contract W-ORD-486; Change Section 2 of Article I-D, Paragraph 3:				
1	Trepanning Lathe including Motors and Control, complete with Boring Bars and Cutting Heads			$64,583.00	93,088
1	Holding Fixture for 72" Trepanning Lathe			2,950.00	93,257
	Extending & Rebuilding Two (2) Rifling Machines			13,200.00	93,068
2	Steel Rifling Bars for Rifling Machines			3,945.00	93,261
	Extending & Reconditioning Eight (8) 42" x 60'-0" Niles-Bement-Pond Boring Lathes shipped to our works from Watervliet Arsenal			83,500.00	93,064
3	Drills Bars			2,715.00	93,251
12	Boring Bars for Combination Boring & Turning Lathes, & 42" x 60' Niles-Bement-Pond Boring Lathes			11,550.00	93,260
	Additional Parts for equipping One (1) Gun Boring Lathe for Boring Hoops			350.00	93,258
6	Reamers for Boring Hoops			5,400.00	188 193.00

93259. Goods and/or service covered by this invoice were produced in accordance with the applicable provisions of the Fair Labor Standards Act of 1938.

32293

140a

Exhibit 11

War Ordnance, 1202 Chamber of Comm Bldg., Pittsburgh, Pa. Oct. 4, 1941.

Mesta Machine Company, Pittsburgh, Pa., 1202 Chamber of Comm Bldg., Pgh. Ord. Dist.

Sept. 30, 1941—Equipment as per itemized invoice #32293 attached $188,193.00.

The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to Procurement Authority enumerated hereon, the available balance of which is sufficient to cover the cost thereof.

Complete payment, $188,193.00.

Mesta Machine Company certified invoice attached. W. Ord. 486—Supp #1.

JOHN D. POTTER,
1st Lt., Ord. Dept.

$188,193.00. Joseph E. Finn, Major, Ord. Dept. Auditor. 210/20141 Ord 7404 P 2-0290 A. 0141-02 E. P. of E. & S. for National Defense 1940-42, $188,193.00.

188,193.00

32293

141a *Exhibit 12*

SHIPPING TICKET

War Department. Q. M. C. Form No. 431. Revised Jan. 3, 1935. Consignor's Vou. No. Memo. Consignee's Vou. No. ------. Number of Sheets 1.

Consignor: Property Officer, Pittsburgh Ordnance District, 1202 Chamber of Commerce Bldg., Pittsburgh, Pa. July 9, 1942, rcm.

Date Shipped or Delivered October 20, 1941.

Ship to Mesta Machine Company, West Homestead, Pa. Authority or Req. No. ------. Contract W-ORD-486.

	Quantity		Stock No.	Article	Unit	Unit cost	Total cost
	Ordered	Shipped					
	1	1	.....	RRD #11489-42—Machine, Rifling, Govt. Serial #WV-432. PG 10059 Mesta 09901 S. O. #93068	Ea.	.....	.....
142a	1	1	.....	Machine, Rifling, Govt. Serial #WV-1553 PG 10058 Mesta 09900 S. O. #93068.	do	.....	.....
	1	1	.....	Lathe, boring, 42" x 60', Govt. Serial #WV-517 Ser. 3387 PG 10046 Mesta 01104 S. O. 93064.			
	1	1	.....	Lathe, boring, 42" x 60', Govt. Serial #WV-524 Ser. 3390 PG 10047 Mesta 01105 S. O. 93064.			
	1	1	.....	Lathe, boring, 42" x 60', Govt. Serial #WV-1876, Ser. 3386 PG 10050 Mesta 01108 S. O. 93064.			
	1	1	.....	Lathe, boring, 42" x 60', Govt. Serial #WV-1948 Ser. 3385 PG 10045 Mesta 01103 S. O. 93064.			
143a	1	1	.....	Lathe, boring, 42" x 60', Govt. Serial #WV-307 Ser. 3384 PG 10051 Mesta 01100 S. O. 93064—Memorandum Receipt.			
	1	1	.....	Lathe, boring, 42" x 60', Govt. Serial #WV-1958 Ser. 3388 PG 10048 Mesta 01106 S. O. 93064.			
	1	1	.....	Lathe, boring, 42" x 60', Govt. Serial #WV-1949 Ser. 3383 PG 10049 Mestal 01107 S. O. 93064.			
	1	1	.....	Lathe, boring, 42" x 60', Govt. Seria #WV-867 Ser. 3393 PG 10052 Mesta 01110 S. O. 93064.			

Articles listed in column "Ordered" have been received unless otherwise noted in column "Shipped."

144a *Exhibit 13*

PROPERTY OF U. S. GOVT.

PG 12222

PITTSBURGH ORDNANCE DISTRICT

Certificates

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a cofrect transcript of the same.

GEO. D. KAHN,
Official Reporter.

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

HENRY ELLENBOGEN, *Judge.*

145a In Court of Common Pleas of Allegheny County

Opinion and Order

Filed January 18, 1943

Opinion by ELLENBOGEN, J.

This case is before the court on an appeal by the Mesta Machine Company from a final assessment made by the Board of Property Assessment, Appeals, and Review of Allegheny County for ad valorem property taxes, pursuant to the Act of May 22, 1933, P. L. 853, Article 2, Section 201, as amended by the Act of July 2, 1941, P. L. 219, Section 1, 72 PS Suppl. 5020-201. The appeal was filed pursuant to Section 12 of the Act of June 21, 1931, P. L. 626.

This case came before us on a petition of the United States of America, asking leave to intervene, filed at the request of the Secretary of War and at the direction of the Attorney General of the United States. We granted the petition and allowed the United States of America to intervene. In the opinion which we filed at that time we stated expressly that our order granting leave to intervene must not be taken as an adjudication of the question whether the assessment by the Board of Property Assessment, Appeals and Review, was valid or contrary to law. Thereafter, the case came on for hearing on the validity of the assessment,

facts were stipulated by the parties, and testimony was taken. This record is now before us for adjudication.

The question here presented is whether the assessment of certain machinery, owned by the United States and leased by it to the Mesta Machine Company, as a part of the real estate
146a of the Mesta Machine Company, is valid. The precise question here presented is a novel one which has never been adjudicated. The case is important because similar arrangements on a vast scale have been entered into by the United States in this and in other States of the Union. We are advised that the case before us is a test case which will determine whether billions of dollars of property belonging to the United States may be assessed for the payment of local taxes.

The facts are not in dispute. On October 30, 1940, the United States of America entered into a written contract with the Mesta Machine Company, a corporation, organized and existing under the laws of the Commonwealth of Pennsylvania, to manufacture for the United States a quantity of large field guns. As a part of the contract, provision was made for the acquisition of special machinery and machine tools necessary to enable the Mesta Machine Company to produce the guns, and for installing the machinery in buildings owned by the company and located in its manufacturing plant in the Borough of West Homestead, Allegheny County, Pennsylvania. A copy of the entire contract, with the exception of certain confidential details which have been deleted, is attached to the petition of the United States for leave to intervene, and was filed as an exhibit in the case. The contract is on a cost-plus and a fixed-fee basis, and deals in part with the production or procurement and installation in the plant owned by Mesta Machine Company of certain machinery and machine tools necessary for the manufacture of guns. Some of the machines (eight Gun-Boring Lathes) were always owned by
147a the United States and were shipped by it to the Mesta plant at West Homestead from its Arsenal at Watervliet, New York. The other machines and equipment were purchased or manufactured by the Mesta Machine Company and sold by it to the United States of America. All of the machinery and equipment are now owned by the United States and have been leased by the Government to Mesta Machine Company for an indeterminate period (until all the guns under the present and future orders have been manufactured), at a rental of $1.00. This machinery and equipment was installed in buildings owned by Mesta Machine Company in West Homestead, Allegheny County, Pennsylvania, and was affixed to the floor of the buildings by bolts and nuts. The contract provides that upon its termination Mesta Machine Company shall remove the machinery and equipment

from its plant and shall ship the same, at the expense of the Government, to a point designated by a representative of the War Department.

The real property of the Mesta Machine Company, consisting of land, buildings, and machinery located therein, was valued and assessed in the triannual assessment made for the years 1940, 1941, and 1942. In February 1942 the Board of Property Assessment, Appeals, and Review revised the assessment and increased it by adding to the valuation, among other items, the value of the machinery in question, appraised at $618,000. Upon refusal of the Board to set aside the assessment as being contrary to law, this appeal was taken.

To complete the statement of fact, reference should be had to Article I–D (g) of the contract between Mesta Machine and the United States, which provides that the Government of the
148a United States shall reimburse the Mesta Machine Company for any "State or local taxes" which it may have to pay on account of said machinery and equipment. The applicable part of the Article reads as follows:

"Article I–D:

"1. The Contractor shall be reimbursed in the manner hereinafter described for ----------

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"(g) Payments from his own funds made by the Contractor (the Mesta Machine Company) under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor."

On the basis of these facts, the Government and the Mesta Machine Company contend, first, that the machinery and equipment in question are personal property and therefore not subject to an assessment for real estate taxes, and, second, that they are not taxable because they are owned by the United States of America.

We shall first deal with the question whether the machinery involved is real estate, as that term is used in the applicable statutes in force in the Commonwealth of Pennsylvania, or whether it is personal property and as such not subject to the tax.

149a The property involved was assessed as a mill or manufactory pursuant to the provisions of the Act of May 22, 1933, P. L. 853, Art. 2, Sec. 201, as amended by the Act of July 2, 1941, P. L. 219, Sec. 1, 72 PS. Suppl. 5020–201, reading as follows:

"The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate:

(a) All real estate to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan-yards, fisheries, and ferries, wharves, and all other real estate not exempt by law from taxation."

This section deals with the assessment and taxation of real estate for local tax purposes. It specifically states that "all" real estate shall be subject to assessment and taxation. To eliminate any doubt as to what is meant by "real estate" the section enumerates various types of property which are considered real estate and are subject to taxation as such. Mills and manufactories of all kinds are included in the enumeration as real estate, Sec. 201 (a):

"All real estate to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, * * *."

In separately enumerating houses, lands, mills and manufactories, and classifying them all as real estate, the Legislature
150a very clearly indicated that by a manufactory it meant a complete establishment consisting of land, buildings, and the machinery which rendered the structure a manufactory, and we so hold. This is the only reasonable construction of the language used in Section 201 (a) and is now so well established by the authorities that it is no longer open to question.

Section 201 (a) of the Act of July 2, 1941, P. L. 219, is identical with the corresponding sections of the Act of April 29, 1844, P. L. 486, Section 32, and the Act of April 15, 1834, P. L. 509.

As early as 1828, prior even to the Act of 1834, it was held by the Supreme Court of Pennsylvania in Gray v. Holdship, 17 S. & R. (36 Pa.) 413, that a copper-kettle or boiler in a brewhouse is a part of the freehold. It was there said that,

"From the adjudged cases on this subject I think we are warranted in saying, that everything put into and forming part of a building, or machinery for manufacturing purposes and essential to the manufactory, is part of the freehold; the wheels of a mill, the stones, and even the bolting-cloth, are parts of the mill and of the freehold, and cannot be levied on as personal property. * * *"

It is clear that a private arrangement or contract between the owner of the land and the owner of the machinery which treats the machinery as personal property and permits its removal from the building at the termination of the contract cannot change the effect of a public statute, and therefore all the machinery and

equipment which are located in a building and are essential or necessary for manufacturing purposes must be deemed real
151a estate for the purpose of the assessment and levying of local taxes under Section 201 of the Act of 1941 and corresponding sections of the prior acts.

In Patterson v. Delaware County, 70 Pa. 381 (1872), it was held that machinery in a factory was properly taxed as real estate as a part of the factory.

In Bemis v. Shipe, 26 Pa. Superior Ct. 22 (1904), it was held that under the Act of April 15, 1834, P. L. 509,[1] a stationary sawmill in which boilers were set in masonry and which was erected upon lands belonging to another, is liable to taxation as real estate for county and township purposes, in spite of the fact that the owner of the sawmill had the right to remove all buildings erected by him upon the expiration of the lease.

In Guthrie v. Pgh. Dry Goods Co., 47 Pa. Superior Ct. 384 (1911), the defendant leased land owned by him for a factory building to a tenant for a term of three years. The tenant brought certain of his own machinery to the premises which remained the personal property of the tenant and was removable by him at the end of the term. The court held that the machinery was taxable as real estate against the owner of the land.[2]

152a In Pennsylvania Stave Company's Appeal, 236 Pa. 97 (1912), it was held that a manufacturing plant consisting of a sawmill, offices, sheds, and barn, was taxable as real estate although the structures were erected by the tenant upon land leased by him for a term of years with a right in the lessee to remove the buildings and machinery at the end of the term, and in Cowanshannock Coal & Coke Company's Tax Assessment, 283 Pa. 122, it was held that where a coal company which owns and operates a private railroad as a necessary part of its equipment and mining operations on land on which it has an interest such railroad is properly included in the tax assessment as a part of the real estate, although the fee to the land was not in the coal company.

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[1] Bemis v. Shipe, 26 Pa. Superior Ct. 22, 46:
"So far as the county and township authorities are concerned, the mills of the plaintiffs and so much of the land as they may occupy in connection therewith are clearly real estate and are to be assessed and taxed as such, regardless of the agreement between them and the owner of the land, by which, as between themselves, the buildings erected by the plaintiffs are to be regarded as personal property. * * *"

[2] Guthrie v. Pgh. Dry Goods Co., 47 Pa. Superior Ct. 384, 400-401:
"* * * the inclusion of the machinery in the building as a part of that which composed the real estate and contributed to its value must be regarded as bringing it within the category of realty for purposes of taxation. From the point of view of the taxing authorities the property assessed constituted a manufactory. It had all the features and qualities of that kind of real estate and it was evidently the intention of the legislature when providing for the assessment of such property that it should be regarded as an entirety. Mills and manufactories of all kinds are expressly enumerated among the things to be taxed as real estate and these necessarily include the machinery essential to the existence and operation of such establishments. * * *"

The Government and the Mesta Machine Company contend, however, that the machinery is not taxable as real estate where the owner of the machinery has no interest or estate, either as *owner or as lessee, in the land and building* in which the machinery is located. Statements to that effect are contained in some of the adjudicated cases that have been referred to, but we do not
153a believe that they correctly state the law. The appellants cite Dravo Contracting Co. v. Grambling, 45 Pa. Superior Ct. 72 (1910), where a contracting company entered into a contract with a coal company to sink a mining shaft and air shaft in the land owned by the coal company. In order to carry out this construction contract, it was necessary for the contractor to install boilers, one hoisting engine, one compressor, a steel tower and a dynamo, which were all to be removed at the completion of the construction contract. The lower court held that this equipment was a part of the real estate and as such was properly assessed for purposes of local taxation under the Act of April 15, 1834, and its amendments. This decision was reversed by the Superior Court. It would seem that the assessment in that case was not against the Maryland Coal Company, the owner of the coal mine, but against the Dravo Contracting Company, whose property was merely temporarily on the land for the sole purpose of carrying out a construction contract. The assessment should have been against the owner of the fee and not against the owner of the machinery: Guthrie v. Pgh. Dry Goods Co., 47 Pa. Superior Court 384. But the Superior Court very properly held that the machinery was not taxable as real estate because it was not on the land as a part of the equipment of the coal mine but was there "for a special purpose, and merely temporarily." It would be absurd to hold that construction equipment located on land temporarily for the purpose of erecting a structure or sinking a shaft was a part of the real estate and taxable as real estate. This, in our opinion, is the real basis for the decision in the Dravo
154a Contracting Company case, and not the fact that the Dravo Company had no estate in the land. It is true that in his opinion Justice Beaver referred to the fact that the construction company had no estate in the land, but we believe that he did so only for the purpose of emphasizing that these articles were placed on the land merely temporarily and for a very narrow purpose.

To hold otherwise would enable the owner of a mill or manufactory to escape the assessment and payment of real estate taxes upon that part of the value of a plant which is represented by machinery located therein by simply obtaining the necessary machinery under a bailment lease instead of by purchase. The owner of a factory must pay local taxes upon machinery located in the

factory whether the machinery is owned by him or brought upon the premises by a tenant: Guthrie v. Pgh. Dry Goods Co., supra. In view of this principle of law, to permit the owner of land to escape such taxes where the machinery is upon the same premises but held under a bailment lease, would be an unjust discrimination and would be a violation of Section 1, Article 9, of the Constitution of Pennsylvania, which provides that "all taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, * * *."

The machinery here involved was not placed upon the premises of the Mesta Machine Company temporarily but was placed there to enable the Mesta Machine Company to carry out the purpose for which it had been organized, to wit, the manufacturing of heavy equipment. The fact that in this particular case the
155a equipment involved is heavy guns does not constitute "a special purpose" in the sense in which that word is used in the Dravo Contracting Company case. The placing of machinery in a building for manufacturing purposes for which the building had been erected is not a special purpose that is foreign to that building but constitutes the normal use of the building and real estate involved.

In connection with its contention that the owner of the machinery must have an interest or estate in the land, the Mesta Machine Company cites the case of Midvale Steel & Ordnance Co. v. Eddystone Borough, 15 Del. Co. 93. In that case the tax was assessed against the Remington Arms Company which was neither the owner of the machinery nor of the land and buildings. The assessment was therefore properly set aside. We have also looked at all the other cases in which the statement was made that the owner of the machinery had no estate in the land and we believe that in none of them was that fact decisive.

We are, therefore, of the opinion that the machinery involved here is real estate as that term is used in the Act of April 15, 1834, and its amendments, including the Act of July 2, 1941, and that the mere fact that title to the machinery is not in the Mesta Machine Company but in a third person is not, in itself, sufficient to exempt the machinery from the statute; likewise it is not controlling that, as between the parties, the machinery involved may be considered personalty.

This brings us to the second question involved in the case before
us, whether the fact that the machinery involved is owned
156, by the United States of America renders it non-taxable by the Commonwealth of Pennsylvania and its local subdivisions.

That the taxing by a state or any of its subdivisions of property owned by the United States of America and used by it in carrying

out a constitutional function constitutes a violation of the Constitution of the United States and of the principle of dual sovereignty upon which that Constitution is based, is no longer open to debate. The assessment and levy of such a tax is clearly invalid.

Since the famous case of McCulloch v. State of Maryland, 4 Wheat. 316 (1819), it has been consistently held that property of the United States, being the property of all the people should be subjected to the jurisdiction of that Government only which belongs to all the people and that therefore the property and instrumentalities of the United States of America are, "constructively, without the local, territorial jurisdiction of the individual States, in every respect, and for every purpose, including that of taxation."[3]

In Van Brocklin v. State of Tennessee, 117 U. S. 151, 155 (1885), this principle is appropriately expressed, as follows:

"The people of a State give to their government a right of taxing themselves and their property at its discretion. But the means employed by the government of the Union are not given by the people of a particular State, but by the people of all the States; and being given by all, for the benefit of all, should be subjected to that government only which belongs to all. All
157a subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. The attempt to use the taxing power of a State on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. * * *"

In the Van Brocklin case a tax levied by the State of Tennessee upon lots of ground which had been acquired by the United States on tax sales and which had been sustained by the Supreme Court of the State of Tennessee, was set aside and it was held that the lots, as property of the United States, were exempt from taxation by the State and its municipal subdivisions.[4]

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[3] McCulloch v. State of Maryland, 4 Wheat. 316, at 319.

[4] Van Brocklin v. State of Tennessee, 117 U. S. 151, 178–179:

"The latest utterance of this court upon this subject is in a case decided at the present term, in which Mr. Justice Bradley, delivering the judgment of the whole court, upon a question of the extent of the taxing power of a State, said: 'We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the government of the United States.' Coe v. Errol, 116 U. S. 517, 524."

158a In U. S. v. Rickert, 188 U. S. 432, it was decided that property held by the United States in trust for Indians under the Indian Allotment Act was not taxable by a municipality. A similar ruling was made in Dewey County v. United States, 26 F. 2d 434, and in Lincoln County v. United States, 26 Fed. 2d 435. In Port Angeles Western R. Co. v. Clallam County, 20 F. 2d 202 (1927), it was held that a railroad belonging to a corporation created by the United States for war purposes and wholly owned by it is not subject to taxation. In Irwin v. Wright, 258 U. S. 219, it was held that land of the United States entered within a reclamation project is not subject to state taxation before the equitable title has passed to the entryman and all conditions of the Acts of Congress have been complied with, since "no State can tax the property of the United States within its limits."

In the case of People ex rel. Donner-Union Coke Corp. v. Burke, 204 App. Div. 557, 198 N. Y. S. 601, affirmed 236 N. Y. 650, 142 N. E. 320, the Donner-Union Coke Corp. in 1918 entered into a contract with the Government to build for the United States a byproduct coke plant for the production of toluol
159a and to lease the land upon which it was erected to the United States. Title to the plant was vested in the United States. After the termination of the war, to wit, in June 1920, a contract was entered into between the corporation and the Government pursuant to which the company was to acquire ownership of the plant by paying the purchase price of about five and a half million dollars in twelve equal annual installments. Title to the plant was to remain in the Government until all installments had been fully paid. In 1921 the assessor of the City of Buffalo assessed the land and improvements of the company, including this plant, for purposes of local taxation. The assessment was set aside by the Supreme Court of New York and the decision affirmed by the Court of Appeals. In 1925 the Legislature of the State of New York passed an Act of Assembly specifically designed to make the equitable interest of the corporation in the plant taxable. Pursuant to that Act, the interest of the company in the plant was again assessed, but the assessment was again set aside by the Supreme Court of the State of New York. It was urged that "the government simply holds the legal title to the property assessed as security for the payment of the purchase price to be paid, * * * " and that "the realtor is in fact the equitable owner of the property, although the bare legal title remains in the United States." But the court held that the tax was void because it was

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Pages 179–180:
"* * * To allow land, lawfully held by the United States as security for the payment of taxes assessed by and due to them, to be assessed and sold for State taxes, would tend to create a conflict between the officers of the two governments, to deprive the United States of a title lawfully acquired under express acts of Congress, and to defeat the exercise of the constitutional power to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States."

a tax on the legitimate functions of the Government, embarrassed the Government in getting the best sales price for the plant,
160a and retarded, impeded, and burdened the national government in its operation.[5]

It is clear that the contract between the Mesta Machine Company pursuant to the terms of which the machinery involved has been installed in the buildings owned by the Mesta Machine Company at West Homestead, Pa., was entered into by the Government for the purpose of obtaining guns necessary for the war with Germany, Japan, and Italy. The contract before us was, therefore, entered in execution of a constitutional purpose and indeed for the purpose of meeting the primary obligation imposed upon the Government, to defend the people of the United States against aggression and to carry the war upon which it is lawfully engaged to a successful and victorious conclusion. While the assessment and tax involved here is nominally against the Mesta Machine and not against the Government of the United States, its effect is to increase the price which the Government must pay for the
161a manufacture of the heavy guns which it needs. The tax in question undoubtedly impedes and burdens the National Government in its most vital operations, is clearly in violation of the Constitution of the United States, and is utterly void and of no effect.

In making this decision we are not influenced by the fact that under its contract with the Mesta Machine Company, the Government is under obligation to reimburse the company for the amount of the tax involved here if the assessment and tax should be sustained. This obligation is purely contractual, was voluntarily assumed by the Government, and therefore cannot be urged by the United States in resisting the assessment and tax: Alabama v. King & Boozer, 314 U. S. 1, and Curry v. U. S., 314 U. S. 14.

We are in sympathy with the argument that where property such as the machinery involved here enjoys the police and fire protection, and highway, sewer, and other municipal services, it should in fairness bear its pro-rata share of the local taxes, raised for the purpose of supplying these services. The courts, however, are unable to permit the assessment of Government property unless the Congress, by proper legislation, consents thereto, and the County and Borough authorities must address themselves to the

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[5] People ex rel. Donner-Union Coke Corp. v. Burke, 204 App. Div. 537, 198 N. Y. S. 601, 217 N. Y. S. 803, 808–809:

"* * * If the government, in selling the coke plant to the realtor or to any other party, was required to sell on the condition that the purchaser should pay taxes on the property agreed to be bought at its full value, notwithstanding the government retained title until the final payment was made, it follows as matter of course such a purchaser would be unwilling to pay as large a sum for it as it would if the property bought were free from taxation. The federal government under such conditions would be embarrassed in getting a price equal to the price it otherwise could obtain, and this would retard, impede, and burden the national government in its operations, just as was held it did in the attempted taxation in the case of the Astoria Light, Heat & Power Corporation."

Congress, if they desire relief. We might add that it would be equitable that the Congress of the United States pass legislation providing for the payment of a fair share of local taxes for property of the United States so situated. In doing so, the Congress need only follow the precedent which it has set in the low-cost, slum clearance, and defense housing legislation, which
162a provides for the payment of an equitable share of the local taxes on such housing.

The appeal will be sustained and the assessment of the machinery owned by the United States of America will be set aside.

Order

And now, to wit, this 18th day of January, A. D. 1943, after the taking of testimony and the hearing of arguments, and upon consideration thereof, the appeal in the above entitled case is sustained, the assessment of the machinery owned by the United States of America in the sum of $618,000.00 is set aside, and the assessment of the machinery of the Mesta Machine Company is reduced from $2,489,085.00 to $1,871,085.

The County of Allegheny is ordered to pay the costs of this proceeding.

By the Court,

ELL.

Ex die, exception noted to the Board of Property Assessment, Appeals and Review of Allegheny County, and bill sealed.

[SEAL] HENRY ELLENBOGEN, *Judge*.

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163 In the Supreme Court of Pennsylvania, Western District

Docket Entries

No. 77 March Term, 1943

IN RE APPEAL OF MESTA MACHINE COMPANY FROM ASSESSMENT BY THE BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW OF ALLEGHENY COUNTY FOR THE YEAR 1942 OF PROPERTY IN WEST HOMESTEAD BOROUGH

APPEAL OF COUNTY OF ALLEGHENY

Appeal from the order of the Court of Common Pleas of Allegheny County at No. 1560 July Term 1942

January 29, 1943, Appeal and affidavit filed and writ exit.
February 5, 1943, Appearance for appellee filed.

March 17, 1943, Assignments filed.

March 18, 1943, Record and Testimony filed. F–6.

March 19, 1943, Appearance of Chas. F. Uhl, United States Attorney for the Western District of Pennsylvania, filed.

March 26, 1943, Argued. 101.

May 12, 1943, Decision.

The order is reversed, and the assessment of $3,901,504 made by the Board of Property Assessment, Appeals, and Review of Allegheny County of the mill of the Mesta Machine Company for the year 1942 is restored and affirmed; costs to be paid by the Mesta Machine Company. Drew, J. Mr. Justice Horace Stern and Mr. Justice Allen M. Stearne dissent; and Mr. Justice Horace Stern files a dissenting opinion, in which Mr. Justice Allen M. Stearne, concurs.

May 24, 1943, remitted.

May 27, 1943, Petition by Mesta Machine Co. and United States of America, intervening appellee, for supplemental certiorari, record to be held for thirty (30) days, during which period petitioners may file petition for reargument or for allowance of appeal to Supreme Court of United States, or both, filed.

ORDER

And now, to wit, this 4th day of June 1943, the foregoing petition having been presented, it is, upon consideration thereof

Ordered that a Supplemental Writ of Certiorari issue in
164 this case, directed to the Prothonotary of the Court of Common Pleas of Allegheny County, Pennsylvania, requiring him to return the record of this case to the Prothonotary of this Court, at Pittsburgh; and it is further:

Ordered that when so returned by the Prothonotary of the Court of Common Pleas of Allegheny County, Pennsylvania, the record aforesaid shall be held by the Prothonotary of this Court, for a period of thirty (30) days and that within said period of thirty (30) days the petitioners, United States of America and Mesta Machine Company or either of them, shall have the right to file their petition or petitions for reargument of this case, or for the allowance of an appeal or appeals to the Supreme Court of the United States, or both.

Per Curiam.

D.

June 5, 1943, Writ exit.

June 18, 1943, Petition by Mesta Machine Co., appellee, for extension until July 24, 1943, of order, to hold record for appeal to Supreme Court of United States, filed.

ORDER

June 28, 1943, the within petition is granted; the record will be held until July 24, 1943. G. W. Maxey, C. J.

July 21, 1943, Motion for reargument and acceptance of service of filing of motion, filed.

ORDER

Aug. 12, 1943, Petition for reargument refused. Per Curiam.

ORDER

And now, August 16, 1943, it is ordered that the Prothonotary of this Court shall hold the record in this case for the period of ninety days, during which time the Petitioners, Mesta Machine Company and the United States of America, or either of them shall have the right to file their petition or petitions for the allowance of an appeal to the Supreme Court of the United States as provided by law. Geo. W. Maxey, Chief Justice.

165 September 9, 1943, Petition for appeal to the Supreme Court of the United States; Assignment of Errors; Statement of Jurisdiction; Acceptance of Service, filed.

ORDER ALLOWING APPEAL

The appellants in the above-entitled suit, Mesta Machine Company, and the United States of America, Intervenor, and both of them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above-entitled suit by the Supreme Court of the State of Pennsylvania on the 12th day of May 1943, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Pennsylvania in the above-entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Pennsylvania, shall prepare and certify a transcript of the record, proceedings, and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within

thirty days of this date. Dated September 15, 1943. George W. Maxey, Chief Justice of the Supreme Court of Pennsylvania.

September 17, 1943, Praecipe for certification of the transcript of record to Supreme Court of the United States filed.

September 18, 1943, Citation with acceptance of service by Walter P. Smart, County Solicitor of Allegheny County and Harry M. Montgomery, Assistant County Solicitor of Allegheny County dated September 18, 1943, filed.

September 18, 1943, Acceptance of service by Walter P. Smart, County Solicitor of Allegheny County of copy of petition for allowance of appeal to Supreme Court of the United States, together with copy of assignment of errors and statement of
166 *of* jurisdiction filed.

September 18, 1943, Statement of points relied on lodged.

September 29, 1943, Bond of Mesta Machine Company with American Surety Company as surety in the sum of $250.00 conditioned for the payment of costs and with the following order of approval attached, filed.

ORDER OF COURT

And now, September 29, 1943, the foregoing bond is approved. George W. Maxey, Chief Justice of the Supreme Court of Pennsylvania.

October 1, 1943, Appellee's Statement addressed to the Supreme Court of the United States opposing Jurisdiction and Motion to Dismiss or Affirm; and Acceptance of service, filed.

October 1, 1943, Stipulation designating the parts of the Record to be included in the Transcript on Appeal to the Supreme Court of the United States, filed.

October 5, 1943, Original citation with acceptance of service endorsed, authenticated transcript of record and statement of points relied upon delivered to Honorable Elder W. Marshall, of counsel for appellants, for transmission to the Supreme Court of the United States.

For Appellant: Walter P. Smart, Harry M. Montgomery.

For Appellee: Elder W. Marshall, Carl E. Glock, Reed, Smith, Shaw & McClay, Attys. for Mesta Machine Co. Samuel O. Clark, Jr., Sewall Key, Paul F. Mickey, Attys. for United States of America; Chas. F. Uhl, United States Atty. for the West. Dist. of Penna.

167 In Supreme Court of Pennsylvania

Assignments of Error

1. The lower Court erred in entering the following Order, which Order and the exception thereto are as follows:

"ORDER

"And now, to wit, this 19th day of October A. D. 1942, the rule to show cause heretofore granted is made absolute and the United States of America is hereby allowed to intervene in the appeal pending at the above-mentioned number and term.

"By the Court,

"ELL.

"Eo die, exception noted to the Board of Property Assessment, Appeals, and Review of Allegheny County, and bill sealed.

"[SEAL] HENRY ELLENBOGEN, *Judge*."

(R. p. 24a.)

2. The lower Court erred in overruling the Board's objec-

168 tion to the following offer of testimony, which offer, the objection thereto, the ruling thereon and the exception thereto are as follows:

"Mr. MICKEY. Paragraph four: 'On or about November 1, 1940, Mesta Machine Company entered into a contract with the United States, No. W-ORD-486, to manufacture for the United States a quantity of large field guns, which contract was amended by a supplemental agreement between Mesta Machine Company and the United States, dated February 24, 1941. A copy of said contract and a copy of said amendment thereto, which are true and correct except that there have been deleted therefrom certain figures not material to the present controversy that in the public interest should not be disclosed, are attached to and made a part of the Intervening Petition of the United States filed herein. Said copy of the contract and the amendment thereto are made a part hereof by reference.'

"Mr. MONTGOMERY. Objection is entered to that as being incompetent, irrelevant and immaterial. The County does not deny, however, that there is such a contract in existence.

"Mr. MICKEY. Your objection is that the statement is immaterial, not that it is incompetent. You agree that such a contract was entered into and that the copy of the contract as attached to the intervening petition of the United States which has been filed herein is a true and correct copy of the contract with the exceptions stated in this paragraph?

"Mr. MONTGOMERY. Agree to that extent; yes, sir.

169 "Objection overruled.

"Exception noted."

(R. pp. 43a–44a.)

3. The lower Court erred in overruling the Board's objection to the following offer of testimony, which offer, the objection thereto, the ruling thereon and the exception thereto are as follows:

"Mr. MICKEY. Paragraph five: 'Mesta Machine Company erected a building, #30, which is otherwise known as the Ordnance Building, on land owned by Mesta Machine Company, which was to be and was equipped with machinery and machine tools as set forth in Schedules A, B, and C of said contract and in the list attached to the petition of Mesta Machine Company filed herein, and in the document offered in evidence herein and marked as "County's Exhibit C," all of which machinery and machine tools were furnished by the United States, as provided in the contract and as hereinafter set forth.'

"Mr. MONTGOMERY. Down to the portion where it commences, 'all of which machinery and machine tools were furnished by the United States,' is admitted, but the balance of the paragraph is not admitted at this time.

"Mr. MICKEY. Perhaps it would not be objectionable to counsel for the County if we stated it this way: 'All of which machinery and machine tools were acquired and installed in said building under the provisions of said contract and as hereinafter set forth.'

"Does the County object to that statement?

170 "Mr. MONTGOMERY. No; I will not object to that statement.

"Mr. MONTGOMERY. I would like to enter an objection to the materiality of paragraph five just read, although I will agree to the truth of the statement as read.

"The COURT. Objection overruled. You may proceed.

"Exception noted."

(R. pp. 44a–45a.)

4. The lower Court erred in entering the following Order, which Order and the exception thereto are as follows:

"ORDER

"And now, to wit, this 18th day of January A. D. 1943, after the taking of testimony and the hearing of arguments, and upon consideration thereof, the appeal in the above entitled case is sustained, the assessment of the machinery owned by the United States of America in the sum of $618,000.00 is set aside, and the assessment of the machinery of the Mesta Machine Company is reduced from $2,489,085.00 to $1,871,085.

"The County of Allegheny is ordered to pay the costs of this proceeding.

"By the Court,

"ELL.

"Eo die, exception noted to the Board of Property Assessment, Appeals, and Review of Allegheny County, and bill sealed.

"[SEAL] HENRY ELLENBOGEN, *Judge*."

(R. p. 162a.)

171 In the Supreme Court of Pennsylvania, Western District

No. 77 March Term, 1943

IN RE APPEAL OF MESTA MACHINE COMPANY FROM ASSESSMENT BY THE BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW OF ALLEGHENY COUNTY FOR THE YEAR 1942 OF PROPERTY IN WEST HOMESTEAD BOROUGH

APPEAL OF COUNTY OF ALLEGHENY

Appeal from the Order of the Court of Common Pleas of Allegheny County at No. 1560 July Term 1942

Opinion of the Court

Filed May 12, 1943

DREW, J.

This is an appeal from an order of the Court of Common Pleas of Allegheny County reducing a final assessment on the real estate of the Mesta Machine Company, a private corporation located in the Borough of West Homestead, Allegheny County, Pennsylvania, made by the Board of Property Assessment, Appeals and Review for ad valorem taxes, pursuant to the Act of May 22, 1933,[1] P. L. 853, Art. II, sec. 201, as amended by the Act of July 2, 1941, P. L. 219, sec. 1.[2]

172 At the triennial assessment for the years 1940, 1941, and 1942, the taxable value of the mill of the Mesta Company, consisting of lands, as well as buildings and machinery located

[1] The provision contained in sec. 12 of the Act of June 21, 1939, P. L. 626, that "The action of the court (below) shall be final," does not apply to assessments made prior to those for the triennial period beginning 1943.

[2] This section of the statute provides: "The following subjects and property shall, as hereinafter provided, be valued and assessed and subject to taxation for all county, city, borough, town, township, school, and poor purposes at the annual rate: (a) All real estate to wit: Houses, lands, lots of ground and ground rents, *mills* and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries and ferries, wharves, and all other real estate not exempt by law from taxation." [Italics added.]

therein, was valued and assessed for real estate tax purposes. In February 1942, the Board increased the assessments, inter alia, by the sum of $618,000, to cover the value of certain additional machinery which had been installed on the premises as an integral part of the mill. This machinery was placed in the mill of the Mesta Company, which was the record owner of the land upon which its mill was located, not on a temporary basis, but instead to enable that company to carry out the very purpose for which it was organized, i. e., the manufacture of heavy equipment for profit. This revised assessment was sustained by the Board; and the Mesta Company, contending that it was not liable for the tax based on the additional assessment for the reason that the company did not own that machinery but merely leased it from the United States government which held title thereto, appealed to the Court of Common Pleas. That tribunal permitted the Federal government to intervene in the proceeding, over the objection of the County. After hearing, the court below entered an order sustaining the appeal, setting aside the assessment as to that machinery and reducing the assessment of the mill of the Mesta Company by the sum of $618,000. From that order, the County of Allegheny has appealed to this Court.

This is a case of great importance because our decision will not only dispose of the present controversy, but will also affect many similar arrangements which have been or will be entered into by the United States government with various individuals and companies throughout this Commonwealth as a result of the present national emergency.

The principal contention of Allegheny County is that there is no competent evidence to support the action of the court below in reducing the assessment here under consideration. The County presented a prima facie case by the production of the record
173 of assessment, made by proper officers and approved by the Board of Property Assessment, Appeals and Review: Chatfield v. Board of Rev. of Taxes, 346 Pa. 159; Westbury Apartments, Inc., Appeal 314 Pa. 130. The Mesta Company and the intervenor, the Federal government, to meet the burden thus cast on the company, offered in evidence a contract entered into between them on October 30, 1940, whereby the company, on a cost-plus-and-fixed-fee basis, undertook to manufacture heavy field guns for the government. This agreement specifically set forth, among other things, that the machinery, the assessment of which gave rise to this appeal, was the property of the Federal government which leased it to the Mesta Company for an indeterminate period, at the nominal rental of one dollar; that the machinery was to be installed on the land and in a building owned by the

Mesta Company for the latter's use in manufacturing for profit the war matériel contracted for; and that upon the termination of the contract the Mesta Company was to remove the machinery and ship the same, at the expense of the government, to a point to be designated by a representative of the War Department. This agreement was admitted in evidence over the objection of the County, which argues that the court below thereby committed error.

There can be no doubt that the machinery here under consideration formed a real and permanent part of the mill of the Mesta Company, and was, therefore, a proper subject of assessment as real estate, under the provisions of section 201 of the Act of May 22, 1933, P. L. 853, as amended. In Patterson v. Delaware County, 70 Pa. 381, it was held that the land and building, as well as the machinery, which constituted a cotton factory, were taxable as real estate, under the 32d section of the Act of April 29, 1844, P. L. 486 (the provisions of which are practically identical with those of section 201 of the Act of 1933, as amended). There the court below said, and its views were affirmed by this Court in a per curiam opinion (p. 383):

174 "That the property taxed in the case before us is real estate is not, of course, doubted. But the plaintiff thinks this particular kind of real estate was not intended to be taxed. He argues that the enumeration of certain kinds in the act, as 'houses, lands, lots of ground, ground-rents, mills,' etc., was to designate precisely what the legislature intended by the preceding terms 'all real estate,' and that everything not embraced in this enumeration is excluded. But this view seems to overlook the very important language, before referred to, which follows the enumeration: 'all other real estate.' * * * Does not the property here taxed fall within the enumeration? The machinery in a mill is as much a part of it as are the walls * * * The plaintiff admits this; but says the legislature did not use the term 'mill' in this sense; that while such is the legal signification of the term, the popular meaning is otherwise; and that the legislature must be regarded as adopting the latter. But is the popular meaning otherwise? When a man, of common intelligence and business experience, speaks of 'Mr. Patterson's Mill,' what does he mean? The establishment in its completed condition—fitted for its proper use? Or the bare walls? (For there is no intermediate point; all between, from the engines to the spindles, is machinery.) He could hardly mean the latter; for the walls do not constitute a mill, and bear no more resemblance to it, than to a barn."

Furthermore, this private arrangement between the Mesta Company, the owner of the land and buildings and operator of the mill, and the Federal government, the owner of the machinery, which treats the equipment as personal property and permits the latter to remove it at the termination of the contract, can in no way change the legal effect of the Act of Assembly which specifically designates machinery, under these circumstances, as real estate for tax purposes. In this connection, it was said in Bemis v. Shipe, 26 Pa. Superior Ct. 42, 45: "It may be admitted
175 that, as between the owners of the land and the owners of the mill, the latter may be regarded and treated by them as personal property, and yet it by no means follows that in contemplation of law for other purposes it is not real estate. Without the express permission of the owners of the land to remove the buildings prior to a certain date, if nothing whatever had been said in regard to them in the original lease, they would doubtless belong to the owners of the land at the expiration of the lease, as being part of the real estate, but such permission does not change the physical character of the property, nor does it in any way change its legal status, except as between the parties themselves and those claiming under them and as to the legal machinery through which the title of the lessees may be transferred to creditors or others who desire to secure their rights." See also Pennsylvania Stave Company's Appeal, 236 Pa. 97; Guthrie v. Pittsburg Dry Goods Co., 47 Pa. Superior Ct. 384.

Nor can the Mesta Company, by its private arrangement acknowledging that the Federal government has title to the machinery which is an integral part of the mill of the company, evade the right of the County to assess the company as the owner of the mill erected upon land title to which is in its name upon the public records. The mill of the company was taxable under the statute as real estate, and this necessarily included the machinery essential to the existence and operation of that manufactory. In Guthrie v. Pittsburg Dry Goods Co., supra, the Superior Court held that the owner of the land and building cannot deny his liability for a portion of the tax because the machinery which composed a permanent and essential part of the manufactory was owned by a tenant who had the right to remove it at the end of his lease. There it was said (p. 401): "Does the private arrangement between the tenant and the landlord which permitted the former to remove the machinery at the end of the term change
the character of the property as affected by the taxing
176 statutes? We think not * * * If the machinery is not to be included there is no manufactory to be taxed and the land and building would be liable not as a factory but as 'other

real estate' as provided in the same section of the statute. The property is either a manufactory or it is not. If a manufactory it is clearly subject to taxation under the specification of that class of property."

The record showed that title to the land was in the Mesta Company, and the assessor was not obliged to go further. Under the circumstances, he was justified in treating the ground, building, and machinery as an entity, a mill, or manufactory, and assessing it as such to the Mesta Company, the registered owner of the land. In Pennsylvania Co. v. Bergson, 307 Pa. 44, 51, this Court said: "When a deed or other conveyance is duly recorded and registered in the name of a given person he, as the registered title holder, is regarded as the 'owner' for purposes of assessment and taxation, and is personally liable for taxes levied on the property. This liability attaches because he holds himself out to the world through public records as owner by being registered and recorded as owner * * * These authorities may, for the purpose of taxation, treat individuals in their several relations as they appear on the designated indices or the public records that are provided." See also Germantown Tr. Co. v. Stanley Co., 338 Pa. 533; Starling v. W. Erie Ave. B. & L. Assn., 333 Pa. 124; N. Phila. Tr. Co. v. Heinel Bros., Inc., 315 Pa. 385. This is true whether or not the registered owner is in fact the actual owner (Trust Co. v. Bank and Tr. Co., 326 Pa. 262); though the actual owner who is not the record owner may also be assessed, if, of course, not exempt for some reason from taxation (Pennsylvania Stave Company's Appeal, supra; Bemis v. Shipe, supra; County of Franklin v. McClean, 93 Pa. Superior Ct. 165). The application of this principle does not constitute a violation of due process within the meaning of the Fourteenth Amendment of the Federal
177 Constitution: Fid.-Phila. Tr. Co. v. Bergson (No. 1), 328 Pa. 545.

It is well established that property held by the United States for the purposes conferred on the government by the Constitution and laws of the United States is beyond the pale of taxation by a State or its political subdivisions (Irwin v. Wright, 258 U. S. 219; City of Phila. v. Harry E. Myers, 102 Pa. Superior Ct. 424), unless, of course, permitted by congressional consent.[3] In holding that real estate owned by the United States government was immune from taxation by the State of Tennessee, the United States Supreme Court, in Van Brocklin v. State of Tennessee, 117

[3] As an example of this, consent to tax the real estate of certain Federal agencies was given in the Act of Congress of January 22, 1932, ch. 8, § 10 (15 U. S. C. § 610), as amended, which provides: "* * * any real property of the corporation (the Reconstruction Finance Corporation and other corporations created under its authority, such as the Defense Plant Corporation, etc.) shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed."

U. S. 151, 155, said: "All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. The attempt to use the taxing power of a State on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give." See also Penn Dairies, Inc. v. Milk Control Commission, — U. S. — (decided March 1, 1943); Clallam County v. United States, 263 U. S. 341; Mint Realty Company v. Philadelphia, 218 Pa. 104. But this sound and well-settled principle of constitutional law is not in any way applicable to the instant circumstances, for the tax on the mill, which necessarily
178 includes the machinery which forms a component part of the manufactory, is not assessed against the government, but rather against its independent contractor, the Mesta Company, which is operating the mill in furtherance of its own business, on land to which it holds the record title. To exempt this machinery from taxation would not be in relief of the government, but rather in relief of the Mesta Company, and, therefore, it is clear that the machinery is the proper subject of assessment for tax purposes as the property of the Mesta Company even though legal title to it is actually in the Federal government. The fact that the latter, by Article I–D [4] of its contract with the company, voluntarily agreed to pay the tax has no bearing whatsoever upon this decision, for the legal obligation to pay was on the company and not on the government: Alabama v. King & Boozer, 314 U. S. 1; Curry v. United States, 314 U. S. 14; Penn Dairies Inc. v. Milk Control Commission, supra. If the Mesta Company defaults in the payment of the tax, the paramount rights of the government in the machinery could not be divested or in any way affected. Cf. New Brunswick v. United States, 276 U. S. 547; City of Phila. v. Harry E. Myers, supra. Thus, the government's status, as far as the machinery is concerned, is precisely the same throughout, and it cannot suffer any loss by reason of the assessment of its machinery as part of the Mesta mill. For these reasons, if for no other, the tax on the mill must be held to be legal and just.

[4] "ARTICLE I–D: 1. The Contractor shall be reimbursed in the manner hereinafter described for * * * (g) Payments from his own funds made by the Contractor (the Mesta Machine Company) under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor."

In upholding the minimum price regulations of the Pennsylvania Milk Control Law of April 28, 1937, P. L. 417, as it affected a dealer selling milk to the government to be disposed of on lands belonging to this Commonwealth but in use by the Federal government as a military encampment, Mr. Chief Justice Stone, in speaking for the United States Supreme Court, in Penn Dairies, Inc. v. Milk Control Commission, supra, said (p. —): "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy * * *" It is a matter of great seriousness to the states and their municipal subdivisions that individuals and corporations pay their fair share in taxes for the benefits they and their personnel undoubtedly receive from the public services they enjoy, such as police and fire protection, the use of streets and schools, and other advantages of community life. These are adjuncts of civilization, necessary but expensive, and those who have them should and must pay for them.

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Moreover, the fact that one of the two possible parties liable for a tax—the record owner or the actual owner—may for some reason be exempt from taxation will not defeat the right of the taxing power to enforce payment by the order. In County of Franklin v. McClean, supra, the County levied a tax against buildings erected upon lands leased by the Commonwealth to a tenant who owned the buildings and under his lease had the right to remove the same at the expiration of his term. The record owner being the sovereign, which is not subject to taxation by its subdivisions, the tax upon the structures was assessed in the name of the tenant, the real owner thereof, and this was held proper by the Superior Court. There it was said (p. 171): "We regard the fact that appellant's estate is held under the State as lessee, rather than under an individual, as immaterial. The tax is not laid against the State nor its interest in the land." In Kittanning Academy v. Kittanning Boro., 8 Pa. Superior Ct. 27, it was held that a dwelling-house and property leased by a corporation for school purposes for a term of years at an annual money rental and an agreement to pay taxes and keep the property in repair does not work an exemption from taxes assessed against the owner of the real estate.

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The County of Allegheny further contends that the court below also erred in permitting the Federal government to intervene in the appeal filed in the court below by the Mesta Company against

whom the assessment was made. We need not pass upon this question, for obviously under our disposition of the controversy the County in no way was harmed by such intervention.

We are satisfied that the evidence that the machinery was not owned by the Mesta Company was irrelevant and, therefore, improperly admitted. Since the record contains no competent evidence to warrant the action of the court below, the order must be reversed and the assessment of the Board reinstated.

The order is reversed, and the assessment of $3,901,504 made by the Board of Property Assessment, Appeals and Review of Allegheny County of the mill of the Mesta Machine Company for the year 1942 is restored and affirmed; costs to be paid by the Mesta Machine Company.

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Mr. Justice HORACE STERN and Mr. Justice ALLEN M. STEARNE dissent; and Mr. Justice HORACE STERN files a dissenting opinion, in which Mr. Justice ALLEN M. STEARNE concurs.

181 In the Supreme Court of Pennsylvania, Western District

No. 77, March Term, 1943

IN RE APPEAL OF MESTA MACHINE COMPANY FROM ASSESSMENT BY THE BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW OF ALLEGHENY COUNTY, ETC.

APPEAL OF COUNTY OF ALLEGHENY

Appeal from Order of Court of Common Pleas of Allegheny County, July Term, 1942, No. 1560.

Dissenting opinion

Filed May 12, 1943

HORACE STERN, J.

In dissenting from the court's decision I start with the observation that never since the foundation of our government, so far as careful research has disclosed, has there been a case, either in a state or a federal court, in which a tax imposed by a state or other local authority on property belonging to the United States was sustained, except where the consent of Congress to such taxation had been given, or where the United States had the legal title to the property but the equitable or beneficial interest was in private ownership. Nor has any difference ever been suggested in the application of this principle between personal property, real estate, and chattels affixed to the land and therefore regarded for

some legal purposes as real property. On the contrary, every reported case has recognized the immunity from local taxation of all property actually owned by the United States. The leading decision to that effect, Van Brocklin v. State of Tennessee, 117 U. S. 151, far from being subsequently questioned or departed from, has been cited with approval and followed in a number of cases continuing in unbroken sequence to the present day; for
182 example: Wisconsin Central R. R. Co. v. Price County, 133 U. S. 496 (where it was said: p. 504: "It is familiar law that a State has no power to tax the property of the United States within its limits"); Clallam County v. United States, 263 U. S. 341 (which extended such immunity to property of a corporation all the stock of which was owned or controlled by the United States, the corporation being an instrumentality organized for the purpose of carrying on the first world war); Lee v. Osceola & Little River Road Improvement District, 268 U. S. 643 (where it was said, p. 645: "It was settled many years ago that the property of the United States is exempt by the Constitution from taxation under the authority of a State so long as title remains in the United States. * * * This is conceded"); Fox Film Corporation v. Doyal, 286 U. S. 123 (where it was said, p. 128: "The property of the United States is not subject to state taxation"). It is true that where land belonging to the government is sold to a purchaser and the latter has complied with all the requirements of the contract, so that nothing remains to be done but the issuance of a patent or the execution of a deed, the property is subject to state taxation, because in that event equitable ownership has passed to the vendee and the government has a mere naked title; however, if any antecedent condition remains unperformed the property, as such, is exempt from local taxation: Railway Co. v. Prescott, 83 U. S. 603; Railway Co. v. McShane, 89 U. S. 444; Northern Pacific R. R. Co. v. Traill County, 115 U. S. 600; Wisconsin R. R. Co. v. Price County, 133 U. S. 496; United States v. Rickert, 188 U. S. 432; Irwin v. Wright, 258 U. S. 219; Jaybird Mining Co. v. Weir, 271 U. S. 609; United States v. City of Milwaukee, 100 Fed. 828; Lincoln County v. Pacific Spruce Corporation, 26 Fed. (2d) 435; Mint Realty Co. v. Philadelphia, 218 Pa. 104, 66 A. 1130; see also City of New Brunswick v. United States, 276 U. S. 547.

183 From a study of these authorities it will be observed that they hold that taxation of government property is prohibited when the tax is assessed, not merely against the United States, but against private individuals or corporations as well, and irrespective of who may have the use or possession of it; in most of those cases the United States was not even a party. The majority opinion cites authorities which it asserts support the proposition that where the tax is not assessed against the govern-

ment but against an independent contractor the immunity do
not exist. This, it seems to me, is a misconception of the import
those decisions. What they hold is that a state has the right
impose a tax on an independent contractor on property owne
not by the United States, but by the contractor; in other wor
the right of a state to tax the property of a citizen is not impair
merely because of the existence of a contract between that citiz
and the United States as the result of which the tax indirectly i
poses an economic burden on the government. As examples
such cases—obviously not to be confused with one such as t
present where the tax is imposed not upon the property of the co
tractor but upon that of the United States—may be cited: Thoms
v. Pacific Railroad, 76 U. S. 579; Railroad Company v. Peniste
85 U. S. 5; Baltimore Shipbuilding & Dry Dock Co. v. Baltimo
195 U. S. 375; Susquehanna Power Co. v. State Tax Commissi
of Maryland, 283 U. S. 291; Taber v. Indian Territory Illuminati
Oil Co., 300 U. S. 1; James v. Dravo Contracting Co., 302 U. S. 1
(where it was said, p. 149: "The tax is not laid upon the gover
ment, its property or officers," nor "upon an instrumentality
the government"); Alabama v. King & Boozer, 314 U. S. 1 (whe
there was a tax on the purchase of building materials by a contra
tor but where impliedly it was held that if the government h
been the purchaser the tax would have been invalid); Cur
184 v. United States, 314 U. S. 14 (where a use-tax was impos
on material of contractors employed by them in the pe
formance of their government contract).

In the present case it must be borne in mind that before, at, a
ever since the time of the imposition of the tax, not only the leg
title but the entire beneficial ownership of the machinery w
solely in the United States; it was merely loaned or leased to t
Mesta Company for the nominal consideration of a dollar. Mor
over, it is not pretended that the tax was based on an apprais
valuation of any interest of the Mesta Company in the machine
arising from its right to use it; the assessment was on its fu
value, appraised as a separate item of property at $618,000, a
was a direct tax on the property itself. As a matter of fact, t
contract between the Mesta Company and the government pr
vided that the company could not use this machinery for a
purpose other than the manufacture of guns for the United Stat
under that contract, so that the company had no interest of i
own in the machinery in connection with any private manufa
turing business it might transact. The law of Pennsylvania do
not permit an assessment against divided equitable interests in re
estate but assesses the entire taxable res as such, and if a tax sa
results from default in the payment of the tax, the title to t

res is sold: Mint Realty Co. v. Philadelphia, 218 Pa. 104, 112, 66 A. 1130, 1132.

In People ex rel. Donner-Union Coke Corporation v. Burke, 204 App. Div. 557, 198 N. Y. S. 601, it was held that a plant (buildings and equipment) owned by the federal government, which was erected during the first world war on land owned by a private corporation and sold to that corporation under a contract reserving title until payment of all installments due, was not subject to taxation by the City of Buffalo. That decision was affirmed
185 by the New York Court of Appeals, without an opinion, in 236 N. Y. 650, 142 N. E. 320. The legislature of New York then passed an act authorizing the assessment and taxation of the interest of the private corporation in the property, such assessment to be at the full value of the property, but it was held that this was nothing more than an attempt, under the guise of taxing the corporation's interest, to tax the property itself, and accordingly, while the assessment of the land belonging to the corporation was sustained, the assessment of the plant built thereon and owned by the United States was vacated and set aside: People ex rel. Donner-Hanna Coke Corporation v. Burke, 217 N. Y. S. 803, affirmed, without an opinion, in 222 App. Div. 790, 226 N. Y. S. 882, and by the Court of Appeals in 248 N. Y. 507, 162 N. E. 503.

In Andrews, Ordway & Green v. The Auditor, 69 Va. (28 Grat.) 115, it was held that buildings which were the property of the United States, erected on land belonging to a private owner and used for dressing stone to be employed in the erection of public buildings at Washington, were not subject to taxation by the State of Virginia either as personal property or as parcel of the land on which the buildings were erected. The court said in language which is here peculiarly apposite: (p. 128: "Undoubtedly where the buildings erected on the land are themselves the subject of taxation, the state will take no notice of private contracts which sever the ownership of the land from that of the buildings, and will hold the owner of the land responsible for the taxes on both. But suppose the buildings are exempt from taxation—how then? Suppose a church or parsonage, or other building used for charitable purposes, is erected on land with the permission of the owner, he retaining the title to the soil on which it stands; can the owner of the land be taxed for the value of
186 such buildings? Certainly not. If authority is wanting for so self-evident a proposition, I refer to the cases cited by the learned counsel for the defendants in error * * *. But it is said that churches and like buildings are exempt from taxation by express statute. So they are. And the buildings erected

by the United States, owned by that government, and used for the lawful purpose of carrying into execution its granted powers, are also exempt from taxation—not by express statute it is true, but by laws as potent and obligatory as if they were written on the statute books of every state in the Union."

In our own state, in County of Franklin v. McClean, 93 Pa. Superior Ct. 165, a private citizen constructed improvements on land leased from the Commonwealth, and it was held that the buildings thus erected were taxable by the county as real estate but the land itself, belonging to the Commonwealth, was not taxable. By the same token the reverse is true; that is to say, if the land were privately owned and the title to the improvements were in the Commonwealth the improvements would be exempt from taxation although the land would be taxable to its owner.

Not only because this machinery is owned by the United States is it exempt from taxation, but also because it is an instrumentality of the United States used in the prosecution of the war and therefore in the exercise of the most vital power conferred by the Constitution upon the federal government. The Mesta Company is an independent contractor and not itself an instrumentality of the government (Penn Dairies v. Milk Control Commission of Pennsylvania, 63 Sup. Ct. Rep. 617, 620) but property can be, and the machinery here is, such an instrumentality: United States v. Rickert, 188 U. S. 432; Port Angeles Western R. R. Co. v. Clallam County, 20 Fed. (2d) 202; Dewey County v. United States, 26 Fed. (2d) 434 (certiorari denied 278 U. S. 649).

187 Indeed, it seems to me inconceivable that a state or other local authority should have the power to impede the national effort to win the war by imposing taxes upon the instruments owned and needed by the government for that purpose. If the United States had guns stored in various cities of the Union, could such cities, or the states in which they were located, impose a property tax upon those implements of warfare? I realize that there has been a trend in the decisions of the Supreme Court of the United States toward holding that non-discriminatory taxation by a state, that is to say, taxation which does not single out the United States as a taxpayer, is not invalid; that trend is discussed in Penn Dairies v. Milk Control Commission of Pennsylvania, 63 Sup. Ct. Rep. 617, 621. But, while a tax discriminating against the United States would certainly be invalid, I do not understand that a tax is valid just because it does not so discriminate; its validity is still subject to the limitation which, resulting from the nature of our federal system, requires that property belonging to the United States, and especially if used by it for the performance of one of its vital constitutional functions, should be exempt from local taxation. If, for example, a property tax

were imposed by a state on all courthouse buildings within the state, could the tax be levied on a federal courthouse there located just because it applied to all courthouses, state and federal alike? If a property tax were imposed by a state on guns carried by persons within the state, could the tax be levied, because it was nondiscriminatory, on guns carried by soldiers of the United States army within that state? The doctrine of "non-discriminatory" taxation has been applied to taxes on the property of contractors dealing with the government, but it has never been held to justify a tax imposed upon the government's own property or upon the instrumentalities through which it exercises the powers
188 granted it by the Constitution. Nor is there any merit in the argument that the machinery, together with all the other property in the mill, is presumably given local police and fire protection. Such protection is also afforded to federal post-offices, courthouses, arsenals and other government establishments, but that does not make them liable to local taxation; it is for Congress alone to declare that, because of this consideration, the state or other local authority should be permitted to tax government property.

The basic theme of the majority opinion is that, although this machinery belongs to the United States, it lost its immunity from state taxation when the government allowed it to be placed in the plant of the Mesta Company; in that connection great stress is laid upon the decisions in Pennsylvania which hold that the tax here imposed is one on the mill or manufactory as a whole, and that tax assessors are not required to investigate whether any part of the equipment belongs to someone other than the apparent owner. It need scarcely be said that the inconvenience which might be occasioned to tax assessors arising from any such duty of investigation (Pennsylvania Company, Trustee, v. Bergson, 307 Pa. 44, 51, 159 A. 32, 34) is not to be weighed against the right of an exempt owner. As far as private persons are concerned, Pennsylvania may, if it sees fit—either as a matter of practical expediency or of economic policy—tax land, building, and equipment as a whole, regardless of the fact that parts of the property may be owned by other persons, and even by citizens of other states: Coe v. Errol, 116 U. S. 517. In the present case, however, we are dealing, not with expediency or policy, but with the constitutional power of Pennsylvania where the owner of part of the property taxed happens to be the United States. It is contended that, although machinery belonging to the government is
189 not taxable so long as it retains its status as personal property, it becomes locally taxable as real property when bolts are driven through it to the floor of the Mesta Company's mill. It

is true, of course, that for certain purposes machinery affixed to a building is regarded by the law as though it were real estate, and, if privately owned, might properly be so regarded for purposes of taxation. Even if, however, it be deemed to be real property, it is real property belonging to the United States and therefore is not taxable. If the United States owned a horizontal islet of land in the middle of the plant, certainly no one would contend that that islet would be taxable; it may not be too fanciful to view this machinery as a piece of vertical real property belonging to the United States, and no more taxable, therefore, than it would be under the hypothesis suggested, for what difference should it make whether the property owned by the government be distinguished from that owned by the Mesta Company by horizontal or by vertical boundary lines? Such a distinction would subordinate actualities to a type of legalism unbefitting the purpose and art of constitutional interpretation. The important point is that, whatever the technical nomenclature ascribed to it, the machinery is owned by, and is an essential instrumentality of, the United States, and it cannot be deprived of the resulting immunity given it under our constitutional system merely because, in order to facilitate its operation, it is necessary temporarily to fasten it to the floor of a mill. Such fastening still leaves it a distinct, individuated part of the property; it does not change its ownership, and it is ownership which is the criterion of taxability under the statute by which this tax is imposed. In short—to state the basic proposition in simple language—the United States owns a distinct, clearly defined, tangible part of this mill and that part is exempt from local taxation.

190 It is said in the majority opinion that "if the Mesta Company defaults in the payment of the tax, the paramount rights of the government in the machinery could not be divested or in any way affected." It seems to me that this very statement constitutes a back-handed acknowledgment of the weakness of the majority viewpoint. The Act of June 4, 1901, P. L. 364, provides that all taxes are first liens on the property taxed and that such liens shall be first paid out of the proceeds of any judicial sale of the property. In the admission, therefore, that this machinery cannot be sold by the taxing authority there is inherent the admission that it cannot be taxed, for, as was said in Mint Realty Company v. Philadelphia, 218 Pa. 104, 110, 66 A. 1130, 1132, "The power to tax implies the power to divest the title by a tax sale when there is default in the payment of the taxes levied," and in Northern Pacific R. R. Co. v. Traill County, 115 U. S. 600, 610; "A valid sale * * * for taxes, being the highest exercise of sovereign power of the State, must carry the title to the

property sold, and if it does not do this, it is because the assessment is void. It follows that, if the assessment of these taxes is valid * * *, the sale confers a title paramount to all others, and thereby destroys the lien of the United States for the costs of surveying these lands. If, on the other hand, the sale would not confer such a title, it is because there exists no authority to make it." As already stated, there is no pretense that the tax here in question was on the interest, equitable or otherwise, of the Mesta Company in the machinery, not only because the company had no such interest apart from its right to use the machinery under its government contract, but because the tax admittedly was on the full value of the machinery and was imposed upon the Mesta Company, not as user or possessor, but as owner of the mill. The situation, therefore, is quite different from that
191 which existed in the case of City of New Brunswick v. United States, 276 U. S. 547, where the vendees of property, the title to which was in the United States, not only had a substantial interest therein, but had completed the payments to the government which entitled them to receive a deed to the property and had thereby relegated the United States to the legal position of a quasimortgagee.

I take it that little, if anything, need be said in justification of the action of the court below in permitting the United States to intervene, for how else could it assert its rights? It is interested not only because it expressly contracted to reimburse the Mesta Company for the taxes which the latter might be required to pay, but because, even in the absence of such a contract, the Mesta Company could recover from it the amount of the tax on the machinery. "As between the real owner and the registered (that is, the nominal or apparent) owner, the latter is secondarily liable and may therefore recover from the real owner sums by him paid on account of the tax": Fidelity-Philadelphia Trust Company, Trustee, v. Land Title Bank & Trust Co., 326 Pa. 262, 264, 192 A. 121, 122. Thus there is peculiarly applicable here the statement made by the court in Colorado Bank v. Bedford, 310 U. S. 41, 52, that "The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself." It is therefore clear that, just as in the Van Brocklin case and many others of those hereinbefore cited, the fact that the assessment of the tax is against the Mesta Company, and not the United States directly, is of no significance as far as the validity of the tax is concerned. The United States is the real party in interest, not because of any indirect shifting to it of the economic burden of the tax, but because it is bound, even irrespective of its contract, to reimburse the Mesta Company

192 and it is therefore the real taxpayer involved. Of course, the Mesta Company also has the right, apart from that of the government, to resist the tax imposed upon it; it is not obliged to submit to an invalid levy and then seek reimbursement from the government.

Because, then, the tax which is sought here to be imposed is on property legally and beneficially in the sole ownership of the United States, and because also it is property which is an instrumentality vital to the execution of the war powers of the government, I do not think it an exaggeration to say, as was said by the court below: "The taxing by a state or any of its sub-divisions of property owned by the United States of America and used by it in carrying out a constitutional function constitutes a violation of the Constitution of the United States and of the principle of dual sovereignty upon which that Constitution is based, is no longer open to debate. The assessment and levy of such a tax is clearly invalid."

I would affirm the order of the Court of Common Pleas of Allegheny County.

Mr. Justice ALLEN M. STEARNE concurs in this opinion.

193 In the Supreme Court of Pennsylvania,
Western District

[Title omitted.]

Petition for supplemental certiorari for additional time within which to file a petition for reargument, etc.

Filed May 27, 1943

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of Pennsylvania:

The petition of Mesta Machine Company, appellee, and United States of America, intervening appellee, respectfully represents:

First. In this proceeding, the County of Allegheny prosecuted its appeal to your Honorable Court, to secure a review of an order entered by the Court of Common Pleas of Allegheny County, Pennsylvania, holding invalid and setting aside the assessment for tax purposes of certain machinery owned by United States of America, which had been assessed as having a value of $618,000,00, and reducing an assessment for tax purposes of certain machinery assessed to Mesta Machine Company from $2,489,085.00 to $1,871,085.00.

Second. After this proceeding had been duly argued, your Honorable Court handed down its opinion and decision on May 12,

1943, reversing said order of the Court of Common Pleas of Allegheny County, Pennsylvania, and determining that
194 said assessments were valid and should be reinstated; and on May 24, 1943, the record of this case, including the opinion and order of your Honorable Court entered as aforesaid on May 12, 1943, was remitted to the Court of Common Pleas of Allegheny County, Pennsylvania.

Third. Your petitioners desire to present their petitions for reargument of this case before your Honorable Court, and it is essential that such petitions be presented in the event either or both of your petitioners, in the protection of their respective interests, should find it desirable to obtain a review of the decision of your Honorable Court by proceedings of appeal or certiorari in the Supreme Court of the United States. They are advised that such a petition for reargument should be made to your Honorable Court before any application is made for the allowance of an appeal or other procedure to secure review of this case by the Supreme Court of the United States.

Fourth. Your petitioners find it advisable to file a joint petition for reargument before your Honorable Court, but the preparation of such petition has proved difficult, and it has been impossible to complete the same at the present time, not only because of the breadth and difficulty of the questions of law involved, but also because counsel for the appellee, Mesta Machine Company, are attorneys at law practicing in Pittsburgh, Pennsylvania, while the attorneys for the appellee, United States of America, are attorneys in the Department of Justice, the offices of which are in the City of Washington, District of Columbia.

195 Fifth. Your petitioners are advised that under Rule 84 of Your Honorable Court, which reads in part as follows:

"Rule 84. Petitions for rearguments must be made before the record is returned to the court below, unless this court, upon cause shown, shall extend the time; * * *."

it is within the power and discretion of your Honorable Court, under such circumstances as exist in this case, to require that the record of this case be returned to your Honorable Court to permit the consideration of your petitioners' petition for reargument and their subsequent petition for the allowance of an appeal, if they should find it desirable to request such allowance, and also to grant to your petitioners such time as shall be reasonably necessary to prepare and file such petitions.

Wherefore, your petitioners respectfully pray that your Honorable Court make an order granting them a supplemental writ of certiorari, directed to the Prothonotary of the Court of Common

Pleas of Allegheny County, Pennsylvania, requiring him to return the record of this case to your Honorable Court, and that your Honorable Court make an order requiring that when so returned, the record aforesaid shall be held by the Prothonotary of your Honorable Court for a period of thirty (30) days, and that during said period of thirty (30) days your petitioners shall have the right to file their petition for a reargument of this case, or for the allowance of an appeal to the Supreme Court of the United States, or both.

And your petitioners will ever pray, etc.

SAMUEL O. CLARK, JR.,
Assistant Attorney General,
CHARLES F. UHL,
United States Attorney,
Attorneys for Petitioner,
United States of America.

ELDER W. MARSHALL,
JOHN C. BANE, JR.,
REED, SMITH, SHAW & MCCLAY,
Attorneys for Petitioner,
Mesta Machine Company.

196 [*Duly sworn to by John C. Bane, Jr.; jurat omitted in printing.*]

[File endorsement omitted.]

197 In Supreme Court of Pennsylvania

Order granting petition for supplemental certiorari, etc.

And now, to wit, this 4th day of June 1943, the foregoing petition having been presented, it is, upon consideration thereof—

Ordered that a Supplemental Writ of Certiorari issue in this case, directed to the Prothonotary of the Court of Common Pleas of Allegheny County, Pennsylvania, requiring him to return the record of this case to the Prothonotary of this Court, at Pittsburgh; and it is further

Ordered that when so returned by the Prothonotary of the Court of Common Pleas of Allegheny County, Pennsylvania, the record aforesaid shall be held by the Prothonotary of this Court for a period of thirty (30) days, and that within said period of thirty (30) days the petitioners, United States of America and Mesta Machine Company, or either of them, shall have the right to file their petition or petitions for reargument of this case, or for the allowance of an appeal or appeals to the Supreme Court of the United States, or both.

Per Curiam.

D.

198 Supreme Court of Pennsylvania, Western District

County of Allegheny

Supplemental certiorari

The Commonwealth of Pennsylvania

To the Judges of the Court of Common Pleas for the County of Allegheny, Greeting:

We being willing for certain further proceedings in the Supreme Court in the matter of appeal of County of Allegheny from the judgment of your said Court, at No. 1560 July Term, A. D. 1942, In re Appeal of Mesta Machine Company from assessment by the Board of Property Assessment, Appeals, and Review of Allegheny County for the year 1942 of Property in West Homestead Borough, before you, or some of you, depending, Do Command You, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Pittsburgh, in and for the Western District, forthwith, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought, as provided in section 18 of Act approved 19 May, 1897, P. L. 67.

Witness the Honorable George W. Maxey, Doctor of Laws, Chief Justice of our said Supreme Court, at Pittsburgh, the 4th day of June in the year of our Lord one thousand nine hundred and forty-three.

PIER DANNALS, *Prothonotary.*

[SEAL OF SUPREME COURT OF PENNSYLVANIA]

198½ *To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Western District:*

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

----------[L. S.]

----------[L. S.]

1560 July 1942. No. 77 of March Term, 1943. Supreme Court. In re: Appeal of Mesta Machine Company from assessment by the Board of Property Assessment, Appeals and Review of Allegheny County for the year 1942 of Property in West Homestead Borough. Appeal of County of Allegheny. Supplemental Certiorari to the Court of Common Pleas for the County of

Returnable forthwith. Rule on the Appellee to appear and plead on the return Day of the Writ. Prothonotary's Office, Filed June 4, 1943, D. Allegheny County, Pa. Filed June 5, 1943. Supreme Court. W. D.

199 In the Supreme Court of Pennsylvania, Western District

[Title omitted.]

Petition for extension of time within which to file the petition for reargument or for allowance of an appeal to the Supreme Court of the United States.

Filed June 18, 1943

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Pennsylvania:

The petition of Mesta Machine Company, appellee, and the United States, intervening appellee, respectfully represents:

1. On May 27, 1943, your petitioners filed a petition for supplemental certiorari in this cause, and for additional time within which to file a petition for reargument or a petition for allowance of an appeal to the Supreme Court of the United States, or both, alleging that the preparation of such petitions for reargument or for the allowance of an appeal, or both, has proved difficult on account of the complexity of the problems of law involved, and because counsel for your petitioners are located in different cities.

2. The petition filed on May 27, 1943, was granted, and an order was entered on June 4, 1943, directing that a supplemental writ of certiorari issue to the Prothonotary of the Court of Common Pleas of Allegheny County, requiring that the record herein be returned to the Prothonotary of this Court at Pittsburgh, and further directing that the Prothonotary of this Court should hold the record for a period of thirty days within which time your petitioners should have the right to file a petition, or peti-
200 tions, for rearguments of this cause, or for the allowance of an appeal, or appeals, to the Supreme Court of the United States, or both.

3. It now appears to your petitioners that the additional time requested was not adequate, and that an additional period of twenty days will be necessary for the preparation of such petitions as your petitioners may desire to file.

4. Your petitioners have requested counsel for the defendant herein to consent that your petitioners be granted an additional period of twenty days within which to file such petitions as may appear advisable, and counsel for the defendant have agreed to such extension.

Wherefore, your petitioners respectfully pray that your Honorable Court make an order requiring the record in this case to be held by the Prothonotary of your Honorable Court until July 24, 1943, and that until that date your petitioners shall have the right to file their petitions for a reargument of this case or for an allowance of an appeal to the Supreme Court of the United States, or both.

And your petitioners will ever pray, etc.

ELDER W. MARSHALL,
JOHN C. BANE, JR.,
REED, SMITH, SHAW & MCCLAY,
Attorneys for Mesta Machine Company.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
CHARLES F. UHL,
United States Attorney.

Consent is hereby given that this petition be granted, and that an order be entered as prayed.

COUNTY OF ALLEGHENY,
By WALTER P. SMART,
County Solicitor.
HARRY M. MONTGOMERY,
Assistant County Solicitor.

201 [*Duly sworn to by John C. Bane, Jr.; jurat omitted in printing.*]

[File endorsement omitted.]

Order

June 28, 43

The within petition is granted; the record will be held until July 24, 1943.

G. W. MAXEY, *C. J.*

202 In the Supreme Court of Pennsylvania, Western District

[Title omitted.]

Motion for reargument

Filed July 21, 1943

Your petitioners, Mesta Machine Company and the United States of America, appellees herein, respectfully pray this Honorable Court to grant a reargument in this cause, to reconsider the

conclusion reached in its opinion filed May 12, 1943, and to reverse that decision. Your petitioners desire a reargument upon the following points:

1. Whether the Act of May 22, 1933, P. L. 853, Art. II, Sec. 201, as amended by the Act of July 2, 1941, P. L. 219, Sec. 1, was intended to authorize the assessment of public property, the property of the United States of America.

2. Whether, if the statute does purport to authorize the assessment of property belonging to the United States of America, it would be valid under the Constitution of the United States merely because the assessment was made against Mesta Machine Company.

REASONS FOR MOTION AND ARGUMENT IN SUPPORT THEREOF

1. The first point is a question of statutory construction upon which this Honorable Court is the Court of last report, and, being without further recourse with respect thereto, your petitioners pray that they be granted the right of reargument. Your petitioners believe that the decision of this Court has overlooked and misapprehended important considerations bearing upon this point and that upon reargument and fuller consideration this Court would answer the question in the negative.

Prior to the decision in this case this Court, in considering
203 the intent and purpose of the statutes levying real property tax, has stated that the policy of the Pennsylvania law is to tax the real owner of real estate. Trust Co. v. Bank & Trust Co., 326 Pa. 262; Pennsylvania Co. v. Bergson, 307 Pa. 44. It has unequivocally stated that a person other than the actual owner who is called upon to pay the tax is, upon payment thereof, subrogated to the rights of the taxing body as against the real owner of the property. Fidelity Ins. Trust & S. Dep. Co. v. Phoenix Bldg. & Loan Assn., 17 Pa. Super. Ct. 270; Trust Co. v. Bank & Trust Co. and Pennsylvania Co. v. Bergson, both supra.

In its opinion filed on May 12, 1943, this Court recognized that "property held by the United States for the purposes conferred on the Government by the Constitution and laws of the United States is beyond the pale of taxation by a State or its political subdivisions, * * * unless, of course, permitted by congressional consent." Yet, at the same time, the Court said that "the machinery is the proper subject of an assessment for tax purposes as the property of the Mesta Company even though legal title to it is actually in the Federal Government."

Petitioners do not understand how the Pennsylvania Act can be construed as intending to impose a tax upon property of the Federal Government when the United States is admittedly the owner, the policy of the law is to tax the owner, and this Court

recognizes that the United States cannot be taxed. It is of no importance that the tax is collected by an assessment against Mesta Machine Company; the law itself subrogates Mesta Machine Company to the position of the taxing body for the purposes of collecting the tax. The effect is to impose a tax upon the United States. As was said in Colorado Bank v. Bedford, 310 U. S. 41, 52, "The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself."

It is not contended that contractual liability for reim-
204 bursement of the amount of the tax or an economic adjustment of prices for services rendered, to include the approximate amount of the tax, will make the United States a "taxpayer." Alabama v. King & Boozer, 314 U. S. 1; Curry v. United States, 314 U. S. 14; James v. Dravo Contracting Co., 302 U. S. 134. But where, as here, the law itself has a fixed policy of taxing the owner and extends a legal right of action, even in the absence of a contract or a price adjustment, the person against whom the right of action is extended must be considered the taxpayer. Colorado Bank v. Bedford, supra; Federal Land Bank v. Bismarck Co., 314 U. S. 95; Blauner's Inc. v. City of Philadelphia, 198 Atl. 889.

In Bemis vs Shipe, 26 Pa. Super. Ct. 42, cited in this Court's opinion, it was said that property belonging to one other than the owner of the land should be included in the assessment of the land to make assessments uniform, in compliance with Section 1, Article IX, of the Pennsylvania Constitution. The court said that it could hardly be conceived that the legislature should intend to exempt from taxation a building upon one tract of land, because it happened to be erected upon a leasehold, under a concession of the right to remove it upon the termination of the lease, and to impose a tax upon a precisely similar building upon a adjoining tract, because it was erected by the owner. With respect to private property the conception may seem unsound. But with respect to public property, the property of all the States, it is the only sound view. The section of the Constitution referred to also provides that the General Assembly may exempt from taxation public property used for public purposes. Though the
205 Legislature has not provided an exemption in this instance, this Court recognizes that an exemption of property belonging to the United States is inherent in the Federal Constitution, and it should not be presumed that the Legislature of Pennsylvania intended to enact a statute in disregard of the constitutional exemption.

Kittanning Academy v. Kittanning Boro., 8 Pa. Super. Ct. 27, also cited by this Court, is not controlling. It held that a dwelling

house and property leased by a corporation for school purposes did not exempt the property from assessment against the owner of the real estate, notwithstanding a statutory exemption of the school property. There the ownership of the property was controlling. It was not the property of the school itself, but was the property of a private corporation. Here Mesta Machine Company did not own the property and held it only for the execution of a public purpose.

In County of Franklin v. McClean, 93 Pa. Super. Ct. 165, a leasehold interest in state lands was held to be taxable to the lessee under the statute here in question, but in that case there was no question of the Federal Constitution involved, and there was no reason to suppose that the Legislature did not intend to tax the interest of McClean. Moreover, the property assessed was not being devoted to a public purpose.

Petitioners submit that the rule expressed in the cases already cited, and in Guthrie v. Pittsburgh Dry Goods Co., 47 Pa. Super. Ct. 384, that the ownership of property is a subordinate matter in the preparation of assessments, is to be applied only to private property. The ownership of public property is a primary matter in questions of taxation and should not be disregarded.

2. The second point upon which petitioners request a reargument is whether the statute would be valid under the Constitution if it does purport to authorize the assessment of property belonging to the United States, merely because the assessment was made against Mesta Machine Company. The question was an-
206 swered in the affirmative. This Court recognized the well-established rule that property held by the United States is beyond the pale of taxation by a state, or its political subdivisions, except by Congressional consent, citing Van Brocklin v. State of Tennessee, 117 U. S. 151; Irwin v. Wright, 258 U. S. 219, and Clallam County v. United States, 263 U. S. 341. The Court then said that these authorities are not applicable because the assessment is not made against the Government but against an independent contractor.

But an examination of all of the cases cited by the Court, and numerous others cited in petitioner's briefs, holding invalid assessments of Government property will show that in all of them except Clallam County v. United States, supra, the assessment was made against private individuals. The rule of the Van Brocklin case is not made to depend upon whether the tax is assessed against the United States or against a private individual, nor upon which is in possession. And, as pointed out by the dissenting Justices, the cases which permit an assessment against property of an independent contractor sustain assessments on property owned not by the United States, but by the contractor.

See, for example, Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375. The right to tax exists only after title passes, Fox Film Corp. v. Doyal, 286 U. S. 123, except where the situation is such that in equity title should have been transferred. There the Supreme Court in exercise of equity powers may treat as done what should have been done, and regard the situation as one where title has passed. New Brunswick v. United States, 276 U. S. 547. There is no case where an assessment of property, title to which was in the United States, has been sustained, whether the assessment was made against the United States or against one of its instrumentalities, or against a private individual.

The fact that Mesta Machine Company has a leasehold interest in the machinery, and that it is located on Mesta's land, is not sufficient to render the property taxable. This is demonstrated by Helvering v. Producers Corp., 303 U. S. 376. With two
207 Justices dissenting that case upheld a federal tax upon the income derived by a corporation from a lease of state lands, but in the majority opinion Chief Justice Hughes pointed out (pp. 384–385) that the tax was sustained only as to income as distinguished from a tax upon the leases themselves or the Government's property. And it should be noted that the Court was speaking of a tax assessed not against the State but against the lessee of state lands. The present case goes beyond the limitations there defined. It does not impose a tax upon the income derived by Mesta Machine Company from its use of federal property, but imposes a tax upon the property itself.

Petitioners believe the decision of this Court was influenced to some degree by a misapprehension of the effect of Penn Dairies v. Milk Control Commission, 318 U. S. 261. The opinion filed May 12, 1943, quoted language from the opinion in that case to the effect that the trend of the decisions of the Supreme Court is not to extend governmental immunity from state taxation and regulation beyond the national Government itself, and governmental functions performed by its officers and agents. But that language referring to extensions of governmental immunity from state regulation nowhere implied an abrogation of existing rules of immunity of Government property from state taxation. Your petitioners request no extension of any rule of immunity. They urge only that assessments of Government property to private individuals have repeatedly been held invalid and should be held so in this instance.

The Penn Dairies case concerned the regulation of a Pennsylvania corporation, not taxation of Government-owned property. A more apposite authority is Pacific Coast Dairy v. Department of Agriculture, 318 U. S. 285. There the Court said (p. 295):

"The court below points out that the statute regulates only
208 the conduct of California's citizens within its own territory; that it is the purchasing, handling, and processing by the appellant in California of milk to be sold below the fixed price—not the sale of Moffett Field—which is prohibited, and entails the penalties prescribed by the statute. And reliance is placed upon the settled doctrine that a state is not disenabled from policing its own concerns, by the mere fact that its regulations may beget effects on those living beyond its borders. We think, however, that it is without application here, because of the authority granted the federal government over Moffett Field.

"In the light of the history of the legislation, we are constrained to find that the true purpose was to punish California's own citizens for doing in exclusively federal territory what by the law of the United States was there lawful, under the guise of penalizing preparatory conduct occurring in the State,—to punish the appellant for a transaction carried on under sovereignty conferred by Art. 1, § 8, clause 17 of the Constitution, and under authority superior to that of California by virtue of the supremacy clause."

In the present case it is said that Allegheny County is only taxing a local and private corporation and is not disabled from including Government property in the assessment merely because the United States has contracted to pay the tax. But the facts clearly show an attempt to tax Government property by "treating" it as Mesta's—and by ignoring the liability of the Government to pay the tax irrespective of contract.

The Penn Dairies case was based to a large extent upon a finding that Congress, by enacting several statutes designed to fix prices and wages, has demonstrated an interest in the preservation of public health equal to its interest in securing the lowest possible prices for federal purchases. There is no room for such implications with respect to the present assessment. To the contrary is the history of Senate Bill 2308. That bill, a copy of which is attached hereto, provided that all real property acquired or purchased by the United States for military purposes, including property acquired for manufacture of munitions, together with improvements on any such property, at the time it is acquired "shall remain subject to taxation" by the state and political subdivision in which it was located to the same extent as other real
property. It was evidently intended to relieve counties
209 and localities in which the Government had purchased huge tracts of land, thus removing substantial sources of revenue from the local tax rolls. The bill was referred to the Committee on Public Lands of the House on July 6, 1942, and died there, apparently without efforts for revival. Thus Congress has refused to permit taxation of federal property which was once a source

of revenue and in spite of the fact that in many instances its removal may work considerable hardship on local governmental units. Certainly there is here no implication of congressional consent to state taxation. Any implication is toward the opposite.

It is suggested in the opinion of this Court that the abatement of the present assessment is not to the relief of the United States, but is for the relief of Mesta Machine Company, and that the property in question is being used by Mesta for a private purpose for its own profit. The interest of the United States is completely ignored, although the record shows that the Government has placed this property in the possession of Mesta Machine Company for use in performance in one of the Government's most vital public functions—the provision for national defense and preservation of the nation. In any period of emergency like the present one where the Federal Government is called upon to expand its activitjes, it has been found essential and more expeditious to utilize all existing facilities and to employ the services of private persons and corporations to operate federal property. Accordingly, the property must be put into the possession of private persons for operation, or maximum performance of governmental obligations cannot be achieved. The immunity of the United States from taxing power of the states would be devitalized if it were limited to taxes assessed against the United States itself. If the states are free to tax the property of the United States while it is thus being operated by private persons, the personal immunity of the United States would become an empty privilege.

As the record discloses, the United States is now paying, under the terms of its contract, all the real estate taxes of Mesta
210 Machine Company on the Company's property, and it is thus bearing an expense which it could avoid entirely by condemnation or by purchase. Moreover, the building owned by Mesta in which the Government's property is situated was erected for the purposes of performance of this contract (R. 44a) and upon this the County of Allegheny is collecting taxes from Mesta Machine Company, which also are indirectly borne by the United States under its contract. Thus, it appears that the County of Allegheny is receiving indirectly from the United States not only the same amount of tax revenue which it received from Mesta alone before the inception of its contract, but also revenue upon the new building which would not have been erected in absence of the contract. After the termination of the contract the building on Mesta's land will remain taxable. Under such circumstances it is not apparent to petitioners that the United States is not bearing a proper share of the burden of local taxation merely because it protests the assessment of property which is its own and was

acquired by it only for the highest governmental purpose and will remain its own after the cessation of hostilities.

PRAYER

For the reasons above, petitioners pray that an order be entered granting a reargument in this case and that the judgment entered herein on May 12, 1943, be reversed. If this motion for reargument is denied petitioners pray that an order be entered directing the Prothonotary of this Court to hold the record in this case for the period of three months during which your petitioners have a right to file a petition for the allowance of an appeal to the Supreme Court of the United States as provided by law.

UNITED STATES OF AMERICA,
By Samuel O. Clark, Jr.,
Assistant Attorney General.
Charles F. Uhl,
United States Attorney.
MESTA MACHINE COMPANY,
By *Reed, Smith, Shaw & McClay,*
Its attorneys.

211 Service of notice of the within application accepted, and a copy of such application received, this 21st day of July 1943.

H. M. MONTGOMERY,
Asst. County Solicitor for County of Allegheny.

212 S 2308

77TH CONGRESS
2D SESSION

In the Senate of The United States

February 24 (legislative day, February 13), 1942

Mr. McNary introduced the following bill; which was read twice and referred to the Committee on Agriculture and Forestry:

A BILL

Providing for taxation by the States and their political subdivisions of certain real property acquired for military purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all real property in the continental United States which is hereafter acquired by purchase, condemnation, or otherwise, by or on behalf of the United States, for general military purposes (including prop-

erty acquired for, or for use in connection with, fortifications, coast defenses, military camps, cantonments, proving grounds, training areas, bomb testing areas, and the manufacture of munitions), together with the improvements on any such real
213 property at the time such property is so acquired, shall remain subject to taxation by the State and political subdivision in which such property is located, to the same extent, according to its value, as other real property is taxed.

SEC. 2. The provisions of this Act shall not apply to any property with respect to which such power of taxation is waived in accordance with State law by the State or political subdivision in which such property is located. Any property covered by any such waiver shall not thereafter be subject to such taxation by the State or political subdivision, as the case may be, so long as such property is held by or on behalf of the United States.

S 2308

77TH CONGRESS
2D SESSION

A BILL

Providing for taxation by the States and their political subdivisions of certain real property acquired for military purposes

By Mr. MCNARY

February 24 (legislative day, February 13), 1942.
Read twice and referred to the Commission on Agriculture and Forestry.
[File endorsement omitted.]

In the Supreme Court of Pennsylvania

Order refusing petition for reargument

AUG. 12.43.

Petition for reargument refused.
Per Curiam.

215 In the Supreme Court of Pennsylvania,
Western District

[Title omitted.]

Petition for allowance of appeal to the Supreme Court of the United States

Filed Sept. 9, 1943

The United States of America and Mesta Machine Company, petitioners herein, respectfully state that on May 12, 1943, this Court entered a judgment against them reversing the judgment of the Court of Common Pleas of Allegheny County, that a motion for reargument was filed on July 21, 1943, and that said motion was denied on August 12, 1943.

Petitioners, believing that the judgment of this Court is incorrect, pray that they may be allowed to appeal to the Supreme Court of the United States for reversal of the judgment of this Court, and that a transcript of the record in this cause, duly authenticated, shall be sent to the Supreme Court of the United States.

Petitioners submit and present to the Court herewith their statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause in compliance with Rule 86 of this Court and Rule 12 of the Supreme Court of the United States.

UNITED STATES OF AMERICA,
By SAMUEL O. CLARK, Jr.
Assistant Attorney General.
CHARLES F. UHL,
United States Attorney.
MESTA MACHINE COMPANY
By REED, SMITH, SHAW & McCLAY,
Its attorneys.

SEPTEMBER 9, 1943.

[File endorsement omitted.]

216 In the Supreme Court of Pennsylvania, Western District

[Title omitted.]

Assignment of Errors

Filed Sept. 9, 1943

The Court erred:

1. In holding that the Act of May 22, 1933, P. L. 853, Art. II. including Sec. 201 thereof, as amended by the Act of July 2, 1941.

P. L. 219, Sec. 1, is constitutional insofar as it purports to authorize the assessment to Mesta Machine Company of property owned by the United States.

2. In holding that the assessment of Government-owned machinery as a part of the real estate of Mesta Machine Company is not in violation of, or repugnant to, the Constitution of the United States.

3. In holding that the evidence of Government ownership of the machinery which was assessed to Mesta Machine Company was irrelevant, and therefore incompetent and inadmissible.

4. In failing to hold that the Act of May 22, 1933, P. L. 853, Art. II, including Sec. 201 thereof, as amended by the Act of July 2, 1941, P. L. 219, Sec. 1, is unconstitutional as applied to property belonging to the United States.

5. In failing to hold that the assessment of Government-owned machinery to Mesta Machine Company was in violation of, and repugnant to, the Constitution of the United States, and therefore invalid and void.

217 6. In failing to hold that the evidence of Government ownership of the machinery which was assessed to Mesta Machine Company was relevant and competent and properly admitted by the Court of Common Pleas of Allegheny County.

7. In reversing the judgment of the Court of Common Pleas of Allegheny County.

8. In restoring and affirming the assessment of Government-owned machinery to Mesta Machine Company.

THE UNITED STATES OF AMERICA,
By SAMUEL O. CLARK, JR.,
Assistant Attorney General.
CHARLES F. UHL,
United States Attorney.
MESTA MACHINE COMPANY,
By REED, SMITH, SHAW & MCCLAY,
Its attorneys.

[File endorsement omitted.]

218 In the Supreme Court of Pennsylvania, Western District

[Title omitted.]

Order allowing appeal

Filed Sept. 15, 1943

The appellants in the above-entitled suit, Mesta Machine Company, and the United States of America, Intervenor, and both of

them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above-entitled suit by the Supreme Court of the State of Pennsylvania on the 12th day of May 1943, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Pennsylvania in the above-entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Pennsylvania shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty days of this date.

Dated September 15, 1943.

GEORGE W. MAXEY,
Chief Justice of the Supreme Court of Pennsylvania.

[File endorsement omitted.]

219 In the Supreme Court of Pennsylvania, Western District

[Title omitted.]

Stipulation designating the parts of the record to be included in the transcript on appeal to the Supreme Court of the United States

It is hereby stipulated and agreed between attorneys for Mesta Machine Company, attorneys for the United States of America, and attorneys for the County of Allegheny, that the record on appeal to the Supreme Court of the United States in this cause shall consist of the entire proceedings before the Supreme Court of Pennsylvania including:

1. The entire record on appeal to the Supreme Court of Pennsylvania from the Court of Common Pleas of Allegheny County, Pennsylvania, as printed and used in the argument in the Supreme Court of Pennsylvania in this case.

2. The assignments of error made by the County of Allegheny on appeal to the Supreme Court of Pennsylvania from the Court of Common Pleas of Allegheny County, Pennsylvania.

3. The docket entries of the Supreme Court of Pennsylvania.

4. The opinion of the Supreme Court of Pennsylvania filed herein on May 12, 1943.

5. The dissenting opinion filed by Justices Horace Stern and Allen M. Stearne herein on May 12, 1943.

6. The petition for supplemental certiorari and for additional time within which to file a petition for reargument, filed on May 27, 1943, the order allowing same, and the supplemental certiorari issued pursuant to said order, on June 4, 1943.

220 7. The petition for further extension of time within which to file a motion for reargument, etc., filed on June 22, 1943, and the order allowing same.

8. The motion for reargument before the Supreme Court of Pennsylvania, filed July 21, 1943, and the order of Court denying the same, dated August 12, 1943.

9. The petition for allowance of appeal to the Supreme Court of the United States.

10. The jurisdictional statement filed by Mesta Machine Company and the United States, including the copy of the opinion and judgment of the Supreme Court of Pennsylvania thereto appended, and including also the copy of the dissenting opinion thereto appended.

11. Assignments of error on appeal to the Supreme Court of the United States, filed by Mesta Machine Company and the United States.

12. The order of the Supreme Court of Pennsylvania allowing an appeal to the Supreme Court of the United States.

13. The statement opposing jurisdiction and motion to dismiss or affirm, filed by County of Allegheny.

14. This stipulation.

United States of America, By Samuel O. Clark, Jr., Samuel O. Clark, Jr., per E. W. M., Assistant Attorney General; Charles F. Uhl, Charles F. Uhl, per E. W. M., United States Attorney; Mesta Machine Company, By Elder W. Marshall, its attorney; County of Allegheny, By Walter P. Smart, Walter P. Smart, County Solicitor; Edward G. Bothwell, Edward G. Bothwell, Assistant County Solicitor.

221 [Bond on Appeal for $250.00 approved and filed Sept. 29, 1943, omitted in printing.]

224 [Clerk's certificate to foregoing transcript omitted in printing.]

226 [Citation in usual form showing service on Walter P. Smart, et al, omitted in printing.]

227 In the Supreme Court of the United States

Statement of points relied upon

Filed Oct. 8, 1943.

Pursuant to Rule 13, Paragraph 9, of this Court, the appellants state that they intend to rely upon all of the points in their Assignment of Errors.

UNITED STATES OF AMERICA,
CHARLES FAHY,
Solicitor General.

By SAMUEL O. CLARK, JR.,
Samuel O. Clark, Jr.,
Assistant Attorneys General.
CHAS. F. UHL,
Charles F. Uhl.
United States Attorney.

MESTA MACHINE COMPANY,
By REED, SMITH, SHAW & MCCLAY,
Reed, Smith, Shaw & McClay,
Its Attorneys.

Receipt of a copy of the foregoing statement of points relied upon is acknowledged this 18th day of September 1943.

WALTER P. SMART,
County Solicitor.

228 In the Supreme Court of the United States

Designation of the portions of the record necessary for consideration of the points relied upon

Filed Oct. 13, 1943

Pursuant to Rule 13, Paragraph 9, of this Court, the appellants designate the entire transcript on appeal as necessary for the consideration of the points relied upon.

UNITED STATES OF AMERICA,
By CHARLES FAHY,
Charles Fahy,
Solicitor General.

SAMUEL O. CLARK, JR.,
Samuel O. Clark, Jr.,
Assistant Attorney General.

MESTA MACHINE COMPANY,
By EDWIN MARSHALL,
REED, SMITH, SHAW & MCCLAY,
Reed, Smith, Shaw & McClay,
Its Attorneys.

ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of the foregoing designation is acknowledged this 11th day of October 1943.

COUNTY OF ALLEGHENY,
By EDWARD G. BOTHWELL,
Edward G. Bothwell,
Ass't County Solicitor.

229 Supreme Court of the United States

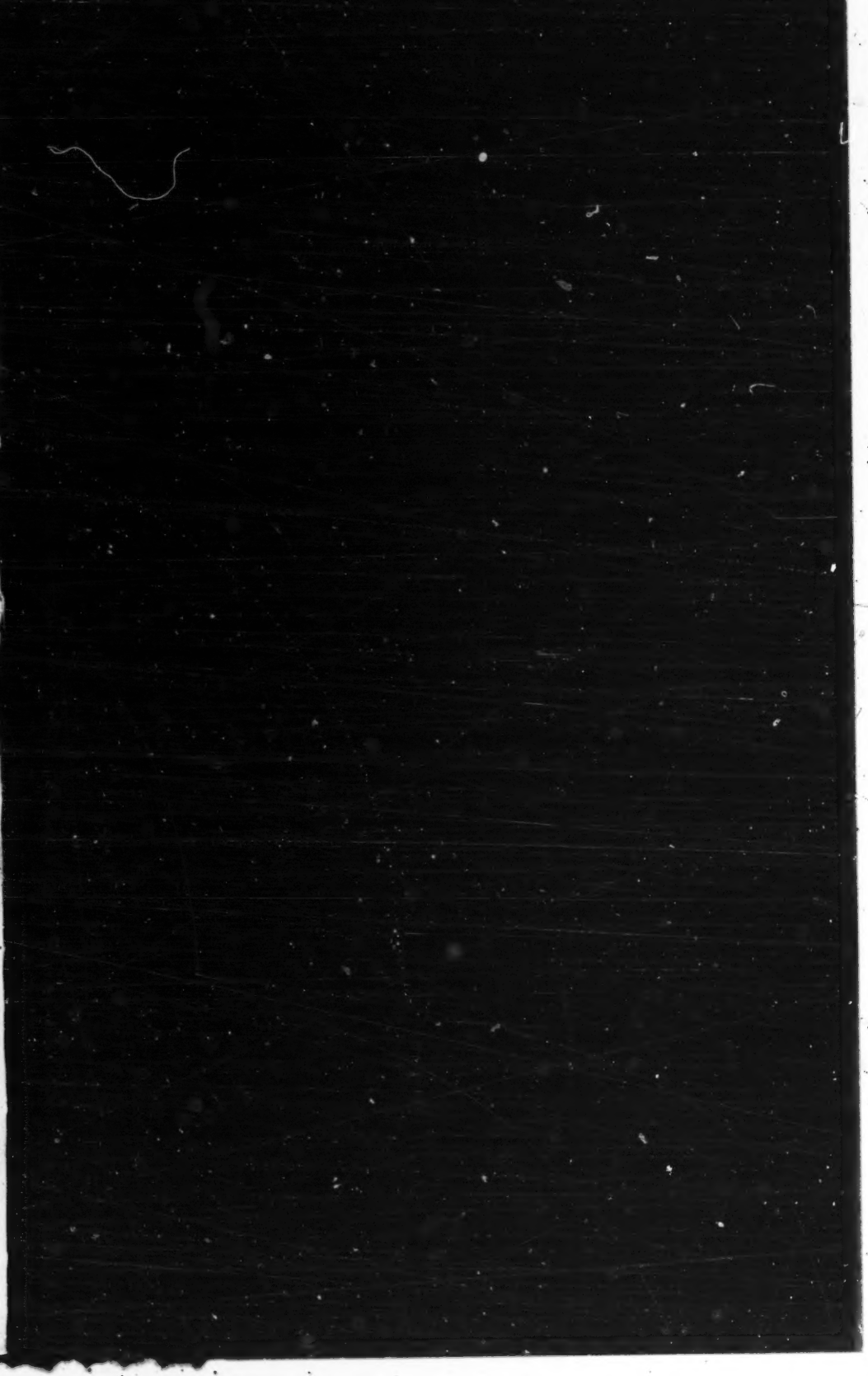
Order postponing further consideration of the question of jurisdiction

October 25, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits.

[Endorsement on cover:] File No. 47910. Pennsylvania Supreme Court. Term No. 417. The United States of America and Mesta Machine Company, Appellants vs. County of Allegheny, Pennsylvania. Filed October 8, 1943. Term No. 417 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE, 1943



In the Supreme Court of Pennsylvania, Western District

MARCH TERM, 1943

No. 77

IN RE: APPEAL OF MESTA MACHINE COMPANY FROM ASSESSMENT BY THE BOARD OF PROPERTY ASSESSMENT, APPEALS, AND REVIEW OF ALLEGHENY COUNTY, ETC.

APPEAL OF COUNTY OF ALLEGHENY

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, the United States of America and Mesta Machine Company herewith submit their statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause. The date of the judgment entered by the Supreme Court of Pennsylvania is May 12, 1943. A petition for additional time within which to file a petition for reargument or a petition for allowance of an appeal was filed in the Supreme Court of Pennsylvania on May 27, 1943 (R. 193), and

55517?—43——1

was allowed June 3, 1943 (R. 197). Supplemental certiorari directing return of the record to the Supreme Court of Pennsylvania was issued pursuant thereto on June 4, 1943 (R. 198). A petition for further extension of the time within which to file a motion for reargument or a petition for allowance of an appeal was filed on June 22, 1943 (R. 199), and was allowed by order of court on or about June 30, 1943 (R. 201). A motion for reargument was filed July 21, 1943 (R. 202), and was denied on August 12, 1943 (R. 214.) The petition for appeal is dated September 9, 1943. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925. The following cases are believed to sustain the jurisdiction of the Supreme Court: *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282; *Bunch* v. *Cole,* 263 U. S. 250; *Lee* v. *Osceola Imp. Dist.,* 268 U. S. 643; and *Van Brocklin* v. *State of Tennessee,* 117 U. S. 151.

STATE STATUTE INVOLVED

The statute of the Commonwealth of Pennsylvania which was held to be valid but which the appellants contended was unconstitutional is the Pennsylvania law providing for the assessment and collection of real estate taxes, The Act of May 22, 1933, P. L. 853 (72 P. S. Sec. 5020–1 *et seq.*), and particularly Section 201 thereof.

Section 201 provides as follows:

> "*Subjects of taxation enumerated.*—The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate:
>
> (a) All real estate, to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tanyards, fisheries, and ferries, wharves, and all other real estate not exempt by law from taxation.
>
> * * * * *

THE NATURE OF THE CASE

In 1941, the United States entered into a contract with Mesta Machine Company for the manufacture of large field guns for the United States Army (R. 71a–122a). By the terms of a separate part of the contract, the United States furnished considerable heavy machinery which was owned by the United States but was leased to Mesta Machine Company for use by it in the manufacture of the guns, on premises owned by the Company[1] (R. 88a–91a).

[1] The contract provided that title to the machinery should at all times remain in the Government (Article I–H; R. 84a), that it should be removed by the United States within ninety days of termination of the contract (Article II–E, R. 90a–

In January 1942, the Board of Property Assessment, Appeals and Review of Allegheny County increased the real property assessment of Mesta Machine Company by adding thereto the valuation of the machinery owned by the United States, which value it fixed at $618,000 (R. 58a–59a). Mesta Machine Company filed an appeal to the Court of Common Pleas of Allegheny County (R. 3a). The United States filed a petition for leave to intervene (R. 8a), was allowed to intervene (R. 16a–24a), and has participated in the litigation continuously since its intervention. Both Mesta Machine Company and the United States attacked the validity of the Pennsylvania taxing statutes as construed and applied, on the ground of repugnance to the Federal Constitution (R. 6a, 12a). On January 18, 1943, the Court of Common Pleas of Allegheny County sustained the appeal and set aside the assessment upon the Government-owned machinery (R. 145a–162a). On May 12, 1943, the Supreme Court of Pennsylvania reversed the order of the Court of Common Pleas, restored the assessment and affirmed it. A copy of the opinion and order is

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91a), and that it should be used by the Company for no purposes other than those specified in the contract (Article II–D (1), R. 89a). The contract was terminable at the will of the United States (Article I–K, R. 86a). The machinery was installed in the building erected by Mesta Machine Company, the building and land upon which it was situated being owned by the Company and located in the County of Allegheny, near Pittsburgh (R. 42a, 55a–56a).

appended hereto. Two Justices dissented on the ground that the machinery remained the property of the United States and did not lose its immunity from state taxation by reason of the fact that it was annexed to the real estate of Mesta Machine Company. A copy of the dissenting opinion is also appended hereto.

THE FEDERAL QUESTIONS AND THE RULINGS THEREON

The appellants contended below that if the Pennsylvania statute as properly construed and applied purported to authorize the assessment, as a part of the mill, of machinery which is the sole property of the United States, it is unconstitutional, and is, therefore, invalid and void.[2]

The constitutionality of the state statute was challenged in the Court of Common Pleas by Mesta Machine Company in its petition on appeal, which contained the following allegation (R. 6a):

> If the laws of Pennsylvania properly construed and applied purport to authorize the assessment and taxation of said machinery and machine tools belonging to the

[2] Appellants also contended below that under the Pennsylvania statute, machinery belonging to anyone other than the owner of a mill was not to be considered a part of the mill for the purpose of real estate tax assessments. This contention raised no federal question, but involved solely a construction of the state statute. Both courts below held that the Pennsylvania statute as properly construed authorized the assessment of machinery as a part of the real estate when located in a mill, whether the machinery was owned by the owner of the mill or by some other person. That question is not argued here.

United States, said laws are in violation of the Constitution of the United States, and are therefore invalid.

The constitutionality of the state statute was challenged by the United States by an identical allegation in the petition for leave to intervene in the Court of Common Pleas (R. 12a). The Court of Common Pleas determined against the validity of the statute and held that "The tax in question * * * is clearly in violation of the Constitution of the United States, and is utterly void and of no effect" (R. 161a). Upon this conclusion of law the Court entered an order setting aside the assessment (R. 162a).

The constitutionality of the state statute was drawn into question in the Supreme Court of Pennsylvania by assignment of error, by brief, and by argument. The question was raised generally by the County of Allegheny when it assigned as error the entry of the trial court's order (R. 170), since the order was based upon the trial court's conclusion, above-quoted, that the tax was void because it was in violation of the Constitution of the United States. The County also raised the question by assigning as an error of the trial court the admission of evidence that the machinery was owned by the United States (R. 167–170). The County admitted that property of the United States could not be assessed against the Government and the Supreme Court of Penn-

sylvania acknowledged this rule (R. 177), but by brief and argument the County contended that evidence of the Government's title to the machinery here assessed was irrelevant because the assessment was not made against the Government but against Mesta Machine Company, and that, therefore, the statute authorizing it was not repugnant to the Constitution of the United States. By brief and at the bar the United States and Mesta Machine Company contended that the evidence of the Government's ownership was admissible because the state could not constitutionally tax Government-owned property, and that this was so irrespective of whether the assessment was entered against the Government or a private individual or corporation. The admissibility of the evidence thus depended upon the Court's answer to the question whether the state statute could authorize the assessment of federally owned property without violating the Federal Constitution. The Supreme Court passed squarely upon this question, reversed the trial court, decided the question adversely to the contention of the appellants, and held that the evidence was improperly admitted.

THE QUESTION IS ONE OF SUBSTANCE

The constitutional question decided by the Supreme Court of Pennsylvania is substantial and important. The United States at the present time owns, through the Navy Department, the War De-

partment, and the United States Maritime Commission, machinery, equipment, and buildings located on private lands, under contracts with private corporations and persons similar to that here involved, to a total value of more than $1,500,000,000.[3] Figures showing the portion of this property which is situated in the State of Pennsylvania are not presently available, but the Navy Department advises that it has at least $70,000,000 worth of machinery located on lands of private companies in that jurisdiction. It is certain that the War Department also has a substantial amount of property located there, in addition to that here involved. The Government and its contractors are now confronted with several assessments already entered against a small part of this property in Pennsylvania and elsewhere, and many others are imminent.[4] If the

[3] Estimates as of April 1943, show the distribution as follows:

War Department	$532,000,000
Navy Department	771,000,000
Maritime Commission	254,000,000
	1,557,000,000

[4] Two other assessments have already been made in the State of Pennsylvania (*Appeal of Kerotest Manufacturing Company*, Court of Common Pleas of Allegheny County, filed March 16, 1943, and *Appeal of Bravo Corporation*, Court of Common Pleas of Allegheny County, filed May 10, 1943). Two assessments on Government-owned shipbuilding facilities located on privately owned lands have been made in the State of Maryland (*Appeal of Bethlehem-Fairfield Shipyard, Inc.*, Baltimore City Court, filed April 10,

present decision is allowed to stand it will encourage assessors generally throughout the country to enter Government property upon their assessment rolls and a substantial portion of the $1,500,000,000 valuation will be taxed.

The decision of the Supreme Court of Pennsylvania on the question of the constitutionality of the statute here involved runs counter to the unbroken line of decisions, beginning with *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, in which the Supreme Court of the United States has held that property of the Federal Government is not subject to the taxing power of the states. That case held invalid an assessment, against a private individual who had purchased land from the United States, for years during which the United States held title to the land. The decision has never been questioned and has frequently been followed or cited with approval. *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496; *Clallam County* v. *United States*, 263 U. S. 341; *Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123; and

1943, and *Appeal of Bethlehem-Sparrows Point Shipyard, Inc.*, Circuit Court of Baltimore County, filed April 10, 1943). Assessments from which no appeal has as yet been filed have been made against Government-owned buildings and equipment located on privately owned lands in New York and Wisconsin. They were entered against Columbian Bronze Corporation and Allis-Chalmers Manufacturing Company, respectively, both of which are contractors with the United States through the Navy Department.

Mayo v. *United States,* decided June 1, 1943, petition for rehearing pending, not yet officially reported. The rule of the *Van Brocklin* case was applied to personalty in *United States* v. *Rickert,* 188 U. S. 432, and it has been followed by state courts in cases involving the identical question here presented. *People* v. *Burke,* 236 N. Y. 650; *People* v. *Burke,* 128 Misc. 195, affirmed 222 App. Div. 790; and *Andrews* v. *The Auditor,* 69 Va. 115.

The Supreme Court of Pennsylvania recognized "the well established rule" that property held by the United States is beyond the pale of taxation by a state or its political subdivisions, except by Congressional consent, citing the *Van Brocklin* case, *Irwin* v. *Wright,* 258 U. S. 219, and *Clallam County* v. *United States, supra.* But it attempted to distinguish the present case from those authorities on the sole ground that the tax here is not assessed against the Government, saying that in such cases the "sound and well-settled principle of constitutional law is not in any way applicable * * * even though legal title to it (the property assessed) is actually in the Federal Government." This asserted distinction is without force. The state tax held invalid in the *Van Brocklin* case was not sought to be collected from the United States itself, but from an individual. That was also true of the tax held invalid in *Irwin* v. *Wright,* and in *United States* v. *Rickert,* both *supra.* The rule

of the *Van Brocklin* case has never been made to depend upon whether the tax is assessed against the United States or against a private individual, nor upon which is in possession. And, as pointed out by the dissenting Justices, the cases which permit an assessment against property of an independent contractor sustain assessments on property owned not by the United States, but *by the contractor.* See for an example, *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375.

The immunity of the United States from the taxing power of the states would be substantially curtailed if it were limited to taxes assessed against the United States itself. In any period of emergency, like the present one, where the Federal Government is called upon to expand its activities, it has been found essential and more expeditious to utilize all existing facilities and to employ the services of private persons to operate federal property. Accordingly, the property must be put into the possession of private persons for operation or maximum performance or Governmental obligations cannot be achieved. If the states are free to tax the property of the United States while it is thus being operated by private persons, the personal immunity of the United States will become an empty privilege.

The Supreme Court of Pennsylvania relied to a great extent upon the local rule of law, applicable to private parties, that machinery or other

personal property, belonging to one person, which is affixed to and made a part of land belonging to another person may be assessed to the owner of the land. Under this rule the owner of the land is "treated as" the owner of the entire property, the tax is collected from him originally, and he is given by statute a right of action against the real owner of the property to collect the amount of the tax. However, this is merely an arrangement of convenience for collection; the policy of the Pennsylvania law is to tax the owner of the property. *Pennsylvania Co.* v. *Bergson*, 307 Pa. 44, 51. Thus, in holding the tax here valid the Pennsylvania court has made a local fiction paramount to the rule that property of the United States may not be taxed by states under the Federal Constitution.

UNITED STATES OF AMERICA,
By SAMUEL O. CLARK, JR.,
Samuel O. Clark, Jr.,
Assistant Attorney General.
CHARLES F. UHL,
Charles F. Uhl,
United States Attorney.
MESTA MACHINE COMPANY,
By REED, SMITH, SHAW & MCCLAY,
Its Attorneys.

SEPTEMBER 9, 1943.

Filed: September 9, 1943. Supreme Court, Western District.

[101]

In the Supreme Court of Pennsylvania, Western District

MARCH TERM, 1943

No. 77

IN RE: APPEAL OF MESTA MACHINE COMPANY FROM ASSESSMENT BY THE BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW OF ALLEGHENY COUNTY FOR THE YEAR 1942 OF PROPERTY IN WEST HOMESTEAD BOROUGH

APPEAL FROM THE ORDER OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY AT NO. 1560 JULY TERM, 1942

APPEAL OF COUNTY OF ALLEGHENY

Filed May 12, 1943

OPINION OF THE COURT

DREW, J.

This is an appeal from an order of the Court of Common Pleas of Allegheny County reducing a final assessment on the real estate of the Mesta Machine Company, a private corporation located in the Borough of West Homestead, Allegheny

County, Pennsylvania, made by the Board of Property Assessment, Appeals and Review for ad valorem taxes, pursuant to the Act of May 22, 1933,[1] P. L. 853, Art. II, sec. 201, as amended by the Act of July 2, 1941, P. L. 219, sec. 1.[2]

At the triennial assessment for the years 1940, 1941 and 1942, the taxable value of the mill of the Mesta Company, consisting of lands, as well as buildings and machinery located therein, was valued and assessed for real estate tax purposes. In February 1942, the Board increased the assessments, inter alia, by the sum of $618,000, to cover the value of certain additional machinery which had been installed on the premises as an integral part of the mill. This machinery was placed in the mill of the Mesta Company, which was the record owner of the land upon which its mill was located, not on a temporary basis, but instead to enable that company to carry out the very pur-

[1] The provision contained in sec. 12 of the Act of June 21, 1939, P. L. 626, that "The action of the court [below] shall be final," does not apply to assessments made prior to those for the triennial period beginning 1943.

[2] This section of the statute provides: "The following subjects and property shall, as hereinafter provided, be valued and assessed and subject to taxation for all county, city, borough, town, township, school, and poor purposes at the annual rate: (a) All real estate to wit: Houses, lands, lots of ground and ground rents, *mills* and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries, and ferries, wharves, and all other real estate not exempt by law from taxation." [Italics added.]

pose for which it was organized, i. e., the manufacture of heavy equipment for profit. This revised assessment was sustained by the Board; and the Mesta Company, contending that it was not liable for the tax based on the additional assessment for the reason that the company did not own that machinery but merely leased it from the United States government which held title thereto, appealed to the Court of Common Pleas. That tribunal permitted the Federal government to intervene in the proceeding, over the objection of the County. After hearing, the court below entered an order sustaining the appeal, setting aside the assessment as to that machinery and reducing the assessment of the mill of the Mesta Company by the sum of $618,000. From that order, the County of Allegheny has appealed to this Court.

This is a case of great importance because our decision will not only dispose of the present controversy, but will also affect many similar arrangements which have been or will be entered into by the United States government with various individuals and companies throughout this Commonwealth as a result of the present national emergency.

The principal contention of Allegheny County is that there is no competent evidence to support the action of the court below in reducing the assessment here under consideration. The County

presented a prima facie case by the production of the record of assessment, made by proper officers and approved by the Board of Property Assessment, Appeals and Review: *Chatfield* v. *Board of Rev. of Taxes*, 346 Pa. 159; *Westbury Apartments, Inc., Appeal*, 314 Pa. 130. The Mesta Company and the intervenor, the Federal government, to meet the burden thus cast on the company, offered in evidence a contract entered into between them on October 30, 1940, whereby the company, on a cost-plus-and-fixed-fee basis, undertook to manufacture heavy field guns for the government. This agreement specifically set forth, among other things, that the machinery, the assessment of which gave rise to this appeal, was the property of the Federal government which leased it to the Mesta Company for an indeterminate period, at the nominal rental of one dollar; that the machinery was to be installed on the land and in a building owned by the Mesta Company for the latter's use in manufacturing for profit the war materiel contracted for; and that upon the termination of the contract the Mesta Company was to remove the machinery and ship the same, at the expense of the government, to a point to be designated by a representative of the War Department. This agreement was admitted in evidence over the objection of the County, which argues that the court below thereby committed error.

There can be no doubt that the machinery here under consideration formed a real and permanent part of the mill of the Mesta Company, and was, therefore, a proper subject of assessment as real estate, under the provisions of section 201 of the Act of May 22, 1933, P. L. 853, as amended. In *Patterson* v. *Delaware County,* 70 Pa. 381, it was held that the land and building, as well as the machinery, which constituted a cotton factory, were taxable as real estate, under the 32d section of the Act of May 29, 1844, P. L. 486 (the provisions of which are practically identical with those of section 201 of the Act of 1933, as amended). There the court below said, and its views were affirmed by this Court in a per curiam opinion (p. 383): "That the property taxed in the case before us is *real estate* is not, of course, doubted. But the plaintiff thinks *this particular kind* of real estate was *not intended* to be taxed. He argues that the enumeration of certain kinds in the act, as 'houses, lands, lots of ground, groundrents, mills,' &c., was to designate precisely what the legislature intended by the preceding terms 'all real estate,' and that everything not embraced in this enumeration is excluded. But this view seems to overlook the very important language, before referred to, which follows the enumeration: 'all *other* real estate.' * * * Does not the property here taxed fall within the enumeration? The machinery in a mill is as much a part

of it as are the *walls* * * * The plaintiff admits this; but says the legislature did not use the term 'mill' in this sense; that while such is the legal signification of the term, the popular meaning is otherwise; and that the legislature must be regarded as adopting the latter. But *is* the popular meaning otherwise? When a man, of common intelligence and business experience, speaks of 'Mr. Patterson's Mill,' what does he mean? The establishment in its completed condition—fitted for its proper use? Or the bare walls? (For there is no intermediate point; all between, from the engines to the spindles, is *machinery.*) He could hardly mean the latter; for the walls do not constitute a *mill,* and bear no more resemblance to it, than to a barn."

Furthermore, this private arrangement between the Mesta Company, the owner of the land and buildings and operator of the mill, and the Federal government, the owner of the machinery, which treats the equipment as personal property and permits the latter to remove it at the termination of the contract, can in no way change the legal effect of the Act of Assembly which specifically designates machinery, under these circumstances, as real estate for tax purposes. In this connection, it was said in *Bemis* v. *Shipe,* 26 Pa. Superior Ct. 42, 45: "It may be admitted that, as between the owners of the land and the owners of the mill, the latter may be regarded and treated by them as personal property, and yet it by no

means follows that in contemplation of law for other purposes it is not real estate. Without the express permission of the owners of the land to remove the buildings prior to a certain date, if nothing whatever had been said in regard to them in the original lease, they would doubtless belong to the owners of the land at the expiration of the lease, as being part of the real estate, but such permission does not change the physical character of the property, nor does it in any way change its legal status, except as between the parties themselves and those claiming under them and as to the legal machinery through which the title of the lessees may be transferred to creditors or others who desire to secure their rights." See also *Pennsylvania Stave Company's Appeal*, 236 Pa. 97; *Guthrie* v. *Pittsburg Dry Goods Co.*, 47 Pa. Superior Ct. 384.

Nor can the Mesta Company, by its private arrangement acknowleging that title is in the Federal government to the machinery which is an integral part of the mill of the company, evade the right of the County to assess the company as the owner of the mill erected upon land title to which is in its name upon the public records. The mill of the company was taxable under the statute as real estate, and this necessarily included the machinery essential to the existence and operation of that manufactory. In *Guthrie* v. *Pittsburg Dry Goods Co.*, supra, the Superior Court held that the

owner of the land and building cannot deny his liability for a portion of the tax because the machinery which composed a permanent and essential part of the manufactory was owned by a tenant who had the right to remove it at the end of his lease. There it was said (p. 401); "Does the private arrangement between the tenant and the landlord, which permitted the former to remove the machinery at the end of the term, change the character of the property as affected by the taxing statutes? We think not * * * If the machinery is not to be included, there is no manufactory to be taxed and the land and building would be liable not as a factory but as 'other real estate' as provided in the same section of the statute. The property is either a manufactory or it is not. If a manufactory it is clearly subject to taxation under the specification of that class of property."

The record showed that title to the land was in the Mesta Company, and the assessor was not obliged to go further. Under the circumstances, he was justified in treating the ground, building and machinery as an entity, a mill or manufactory, and assessing it as such to the Mesta Company, the registered owner of the land. In *Pennsylvania Co.* v. *Bergson*, 307 Pa. 44, 51, this Court said: "When a deed or other conveyance is duly recorded and registered in the name of a given person he, as the registered title holder, is regarded as the 'owner' for purposes of assessment

and taxation, and is personally liable for taxes levied on the property. This liability attaches because he holds himself out to the world through public records as owner by being registered and recorded as owner * * * These authorities may, for the purpose of taxation, treat individuals in their several relations as they appear on the designated indices or the public records that are provided." See also *Germantown Tr. Co.* v. *Stanley Co.*, 338 Pa. 533; *Starling* v. *W. Erie Ave. B. & L. Assn.*, 333 Pa. 124; *N. Phila. Tr. Co.* v. *Heinel Bros., Inc.*, 315 Pa. 385. This is true whether or not the registered owner is in fact the actual owner (*Trust Co.* v. *Bank and Tr. Co.*, 326 Pa. 262); though the actual owner who is not the record owner may also be assessed, if, of course, not exempt for some reason from taxation (*Pennsylvania Stave Company's Appeal*, supra; *Bemis* v. *Shipe*, supra; *County of Franklin* v. *McClean*, 93 Pa. Superior Ct. 165). The application of this principle does not constitute a violation of due process within the meaning of the Fourteenth Amendment of the Federal Constitution: *Fid.-Phila. Tr. Co.* v. *Bergson* (*No. 1*), 328 Pa. 545.

It is well established that property held by the United States for the purposes conferred on the government by the Constitution and laws of the United States is beyond the pale of taxation by a State or its political subdivisions (*Irwin* v. *Wright*, 258 U. S. 219; *City of Phila.* v. *Harry E. Myers*, 102 Pa. Superior Ct. 424), unless, of course, per-

mitted by congressional consent.[3] In holding that real estate owned by the United States government was immune from taxation by the State of Tennessee, the United States Supreme Court, in *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 155, said: "All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. The attempt to use the taxing power of a State on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give." See also *Penn Dairies, Inc.* v. *Milk Control Commission*, — U. S. — (Decided March 1, 1943; *Clal-*

[3] As an example of this, consent to tax the real estate of certain Federal agencies was given in the Act of Congress of January 22, 1932, ch. 8, § 10 (15 U. S. C., § 610), as amended, which provides: "* * * any real property of the corporation [the Reconstruction Finance Corporation and other corporations created under its authority, such as the Defense Plant Corporation, etc.] shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed."

lam County v. *United States*, 263 U. S. 341; *Mint Realty Company* v. *Philadelphia*, 218 Pa. 104. But this sound and well-settled principle of constitutional law is not in any way applicable to the instant circumstances, for the tax on the mill, which necessarily includes the machinery which forms a component part of the manufactory, is not assessed against the government, but rather against its independent contractor, the Mesta Company, which is operating the mill in furtherance of its own business, on land to which it holds the record title. To exempt this machinery from taxation would not be in relief of the government, but rather in relief of the Mesta Company, and, therefore, it is clear that the machinery is the proper subject of assessment for tax purposes as the property of the Mesta Company even though legal title to it is actually in the Federal government. The fact that the latter, by Article I-D[*] of its contract with the company, voluntarily agreed to pay the tax has no bearing whatsoever upon this decision, for the

[*] "Article I-D: 1. The Contractor shall be reimbursed in the manner hereinafter described for * * * (g) Payments from his own funds made by the Contractor [the Mesta Machine Company] under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used, including those owned by the Contractor."

legal obligation to pay was on the company and not on the government: *Alabama* v. *King & Boozer,* 314 U. S. 1; *Curry* v. *United States,* 314 U. S. 14; *Penn Dairies, Inc.* v. *Milk Control Commission,* supra. If the Mesta Company defaults in the payment of the tax, the paramount rights of the government in the machinery could not be divested or in any way affected. Cf. *New Brunswick* v. *United States,* 276 U. S. 547; *City of Phila.* v. *Harry E. Myers,* supra. Thus, the government's status, as far as the machinery is concerned, is precisely the same throughout, and it cannot suffer any loss by reason of the assessment of its machinery as part of the Mesta mill. For these reasons, if for no other, the tax on the mill must be held to be legal and just.

In upholding the minimum price regulations of the Pennsylvania Milk Control Law of April 28, 1937, P. L. 417, as it affected a dealer selling milk to the government to be disposed of on lands belonging to this Commonwealth but in use by the Federal government as a military encampment, Mr. Chief Justice Stone, in speaking for the United States Supreme Court, in *Penn Dairies, Inc.* v. *The Milk Control Commission,* supra, said (p. —): "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have

recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy * * *." It is a matter of great seriousness to the states and their municipal subdivisions that individuals and corporations pay their fair share in taxes for the benefits they and their personnel undoubtedly receive from the public utilities they enjoy, such as police and fire protection, the use of streets and schools, and other advantages of community life. These are adjuncts of civilization, necessary but expensive, and those who have them should and must pay for them.

Moreover, the fact that one of the two possible parties liable for a tax—the record owner or the actual owner—may for some reason be exempt from taxation will not defeat the right of the taxing power to enforce payment by the other. In *County of Franklin* v. *McClean*, supra, the County levied a tax against buildings erected upon lands leased by the Commonwealth to a tenant who owned the buildings and under his lease had the right to remove the same at the expiration of his term. The record owner being the sovereign, which is not subject to taxation by its subdivision, the tax upon the structures was assessed in the name of the tenant, the real owner thereof, and this was held proper by the Superior

Court. There it was said (p. 171): "We regard the fact that appellant's estate is held under the State as lessee, rather than under an individual, as immaterial. The tax is not laid against the State nor its interest in the land." In *Kittanning Academy* v. *Kittanning Boro.*, 8 Pa. Superior Ct. 27, it was held that a dwelling-house and property leased by a corporation for school purposes for a term of years at an annual money rental and an agreement to pay taxes and keep the property in repair does not work an exemption from taxes assessed against the owner of the real estate.

The County of Allegheny further contends that the court below also erred in permitting the Federal government to intervene in the appeal filed in the court below by the Mesta Company against whom the assessment was made. We need not pass upon this question, for obviously under our disposition of the controversy the County in no way was harmed by such intervention.

We are satisfied that the evidence that the machinery was not owned by the Mesta Company was irrelevant and, therefore, improperly admitted. Since the record contains no competent evidence to warrant the action of the court below, the order must be reversed and the assessment of the Board reinstated.

The order is reversed, and the assessment of $3,901,504 made by the Board of Property Assessment, Appeals and Review of Allegheny

County of the mill of the Mesta Machine Company for the year 1942 is restored and affirmed; costs to be paid by the Mesta Machine Company.

Mr. Justice Horace Stern and Mr. Justice Allen M. Stearne dissent; and Mr. Justice Horace Stern files a dissenting opinion, in which Mr. Justice Allen M. Stearne concurs.

In the Supreme Court of Pennsylvania, Western District

MARCH TERM, 1943

No. 77

IN RE: APPEAL OF MESTA MACHINE COMPANY FROM ASSESSMENT BY THE BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW OF ALLEGHENY COUNTY, ETC.

APPEAL FROM ORDER OF COURT OF COMMON PLEAS OF ALLEGHENY COUNTY. JULY TERM, 1942, NO. 1560

APPEAL OF COUNTY OF ALLEGHENY

Filed: May 12, 1943

DISSENTING OPINION

HORACE STERN, J.

In dissenting from the court's decision I start with the observation that never since the foundation of our government, so far as careful research has disclosed, has there been a case, either in a state or a federal court, in which a tax imposed by a state or other local authority on prop-

erty belonging to the United States was sustained, except where the consent of Congress to such taxation had been given, or where the United States had the legal title to the property but the equitable or beneficial interest was in private ownership. Nor has any difference ever been suggested in the application of this principle between personal property, real estate, and chattels affixed to the land and therefore regarded for some legal purposes as real property. On the contrary, every reported case has recognized the immunity from local taxation of *all* property actually owned by the United States. The leading decision to that effect, *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, far from being subsequently questioned or departed from, has been cited with approval and followed in a number of cases continuing in unbroken sequence to the present day; for example: *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496 (where it was said, p. 504: "It is familiar law that a State has no power to tax the property of the United States within its limits"); *Clallam County* v. *United States*, 263 U. S. 341 (which extended such immunity to property of a corporation all the stock of which was owned or controlled by the United States, the corporation being an instrumentality organized for the purpose of carrying on the first world war); *Lee* v. *Osceola & Little River Road Improvement District*, 268 U. S. 643 (where it was said, p. 645: "It was settled many years ago

that the property of the United States is exempt by the Constitution from taxation under the authority of a State so long as title remains in the United States. * * * This is conceded"); *Fox Film Corporation* v. *Doyal,* 286 U. S. 123 (where it was said, p. 128: "The property of the United States is not subject to state taxation"). It is true that where land belonging to the government is sold to a purchaser and the latter has complied with all the requirements of the contract, so that nothing remains to be done but the issuance of a patent or the execution of a deed, the property is subject to state taxation, because in that event equitable ownership has passed to the vendee and the government has a mere naked title; however, if any antecedent condition remains unperformed the property, as such, is exempt from local taxation: *Railway Co.* v. *Prescott,* 83 U. S. 603; *Railway Co.* v. *McShane,* 89 U. S. 444; *Northern Pacific R. R. Co.* v. *Traill County,* 115 U. S. 600; *Wisconsin R. R. Co.* v. *Price County,* 133 U. S. 496; *United States* v. *Rickert,* 188 U. S. 432; *Irwin* v. *Wright,* 258 U. S. 219; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609; *United States* v. *City of Milwaukee,* 100 Fed. 828; *Lincoln County* v. *Pacific Spruce Corporation,* 26 Fed. (2d) 435; *Mi[redacted]Realty Co.* v. *Philadelphia,* 218 Pa. 104, 66 A. 1130; see also *City of New Brunswick* v. *United States,* 276 U. S. 547.

From a study of these authorities it will be observed that they hold that taxation of govern-

ment property is prohibited when the tax is assessed, not merely against the United States, but against private individuals or corporations as well, and irrespective of who may have the use or possession of it; in most of those cases the United States was not even a party. The majority opinion cites authorities which it asserts support the proposition that where the tax is not assessed against the government but against an independent contractor the immunity does not exist. This, it seems to me, is a misconception of the import of those decisions. What they hold is that a state has the right to impose a tax on an independent contractor on property owned, *not by the United States, but by the contractor;* in other words, the right of a state to tax the property of a citizen is not impaired merely because of the existence of a contract between that citizen and the United States as the result of which the tax indirectly imposes an economic burden on the government. As examples of such cases—obviously not to be confused with one such as the present where the tax is imposed *not upon the property of the contractor but upon that of the United States*—may be cited: *Thomson* v. *Pacific Railroad,* 76 U. S. 579; *Railroad Company* v. *Peniston,* 85 U. S. 5; *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore,* 195 U. S. 375; *Susquehanna Power Co.* v. *State Tax Commission of Maryland,* 283 U. S. 291; *Taber* v. *Indian Territory Illuminating Oil Co.,* 300 U. S. 1; *James* v.

Dravo Contracting Co., 302 U. S. 134 (where it was said, p. 149: "The tax is not laid upon the government, its property or officers," nor "upon an instrumentality of the government"); *Alabama* v. *King & Boozer,* 314 U. S. 1 (where there was a tax on the purchase of building materials by a contractor but where impliedly it was held that if the government had been the purchaser the tax would have been invalid); *Curry* v. *United States,* 314 U. S. 14 (where a use-tax was imposed on material of contractors employed by them in the performance of their government contract).

In the present case it must be borne in mind that before, at, and ever since the time of the imposition of the tax, not only the legal title but the entire beneficial ownership of the machinery was solely in the United States; it was merely loaned or leased to the Mesta Company for the nominal consideration of a dollar. Moreover, it is not pretended that the tax was based on an appraised valuation of any interest of the Mesta Company in the machinery arising from its right to use it; the assessment was on its full value, appraised as a separate item of property at $618,000, and was a direct tax on the property itself. As a matter of fact, the contract between the Mesta Company and the government provided that the company could not use this machinery for any purpose other than the manufacture of guns for the United States under that contract,

so that the company had no interest of its own in the machinery in connection with any private manufacturing business it might transact. The law of Pennsylvania does not permit an assessment against divided equitable interests in real estate but assesses the entire taxable res as such, and if a tax sale results from default in the payment of the tax, the title to the res is sold: *Mint Realty Co.* v. *Philadelphia,* 218 Pa. 104, 112, 66 A. 1130, 1132.

In *People ex rel. Donner-Union Coke Corporation* v. *Burke,* 204 App. Div. 557, 198 N. Y. S. 601, it was held that a plant (buildings and equipment) owned by the federal government, which was erected during the first world war on land owned by a private corporation and sold to that corporation under a contract reserving title until payment of all installments due, was not subject to taxation by the City of Buffalo. That decision was affirmed by the New York Court of Appeals, without an opinion, in 236 N. Y. 650, 142 N. E. 320. The legislature of New York then passed an act authorizing the assessment and taxation of the interest of the private corporation in the property, such assessment to be at the full value of the property, but it was held that this was nothing more than an attempt, under the guise of taxing the corporation's interest, to tax the property itself, and accordingly, while the assessment of the land belonging to the corporation was sustained, the assessment of the plant built thereon and

owned by the United States was vacated and set aside: *People ex rel. Donner-Hanna Coke Corporation* v. *Burke,* 217 N. Y. S. 803, affirmed, without an opinion, in 222 App. Div. 790, 226 N. Y. S. 882, and by the Court of Appeals in 248 N. Y. 507, 162 N. E. 503.

In *Andrews, Ordway & Green* v. *The Auditor,* 69 Va. (28 Grat.) 115, it was held that buildings which were the property of the United States, erected on land belonging to a private owner and used for dressing stone to be employed in the erection of public buildings at Washington, were not subject to taxation by the State of Virginia either as personal property or as parcel of the land on which the buildings were erected. The court said in language which is here peculiarly apposite (p. 128): "Undoubtedly where the buildings erected on the land *are themselves the subject of taxation,* the state will take no notice of private contracts which sever the ownership of the land from that of the buildings, and will hold the owner of the land responsible for the taxes on both. But suppose the buildings *are exempt from taxation*—how then? Suppose a church or parsonage, or other building used for charitable purposes, is erected on land with the permission of the owner, he retaining the title to the soil on which it stands; can the owner of the land be taxed for the value of such buildings? Certainly not. If authority is wanting for so self-evident a proposition, I refer to the cases cited

by the learned counsel for the defendants in error * * *. But it is said that churches and like buildings are exempt from taxation by *express statute.* So they are. And the buildings erected by the United States, owned by that government, and used for the lawful purpose of carrying into execution its granted powers, are also exempt from taxation—not by express statute, it is true, but by laws as potent and obligatory as if they were written on the statute books of every state in the Union."

In our own state, in *County of Franklin* v. *McClean,* 93 Pa. Superior Ct. 165, a private citizen constructed improvements on land leased from the Commonwealth, and it was held that the buildings thus erected were taxable by the county as real estate but the land itself, belonging to the Commonwealth, was not taxable. By the same token the reverse is true; that is to say, if the land were privately owned and the title to the improvements were in the Commonwealth the improvements would be exempt from taxation although the land would be taxable to its owner.

Not only because this machinery is owned by the United States is it exempt from taxation, but also because it is an instrumentality of the United States used in the prosecution of the war and therefore in the exercise of the most vital power conferred by the Constitution upon the federal government. The Mesta Company is an independent contractor and not itself an instrumen-

tality of the government (*Penn Dairies* v. *Milk Control Commission of Pennsylvania,* 63 Sup. Ct. Rep. 617, 620) but property can be, and the machinery here is, such an instrumentality: *United States* v. *Rickert,* 188 U. S. 432; *Port Angeles Western R. R. Co.* v. *Clallam County,* 20 Fed. (2d) 202; *Dewey County* v. *United States,* 26 Fed. (2d) 434 (certiorari denied 278 U. S. 649). Indeed, it seems to me inconceivable that a state or other local authority should have the power to impede the national effort to win the war by imposing taxes upon the instruments owned and needed by the government for that purpose. If the United States had guns stored in various cities of the Union, could such cities, or the states in which they were located, imposed a property tax upon those implements of warfare? I realize that there has been a trend in the decisions of the Supreme Court of the United States toward holding that non-discriminatory taxation by a state, that is to say, taxation which does not single out the United States as a taxpayer, is not invalid; that trend is discussed in *Penn Dairies* v. *Milk Control Commission of Pennsylvania,* 63 Sup. Ct. Rep. 617, 621. But, while a tax discriminating against the United States would certainly be invalid, I do not understand that a tax is valid just because it does not so discriminate; its validity is still subject to the limitation which, resulting from the nature of our federal system, requires that

property belonging to the United States, and especially if used by it for the performance of one of its vital constitutional functions, should be exempt from local taxation. If, for example, a property tax were imposed by a state on all courthouse buildings within the state, could the tax be levied on a federal courthouse there located just because it applied to *all* courthouses, state and federal alike? If a property tax were imposed by a state on guns carried by persons within the state, could the tax be levied, because it was non-discriminatory, on guns carried by soldiers of the United States army within that state? The doctrine of "non-discriminatory" taxation has been applied to taxes on the property of contractors dealing with the government, but it has never been held to justify a tax imposed upon the government's own property or upon the instrumentalities through which it exercises the powers granted it by the Constitution. Nor is there any merit in the argument that the machinery, together with all the other property in the mill, is presumably given local police and fire protection. Such protection is also afforded to federal post-offices, courthouses, arsenals and other government establishments, but that does not make them liable to local taxation; it is for Congress alone to declare that, because of this consideration, the state or other local authority should be permitted to tax government property.

The basic theme of the majority opinion is that, although this machinery belongs to the United States, it lost its immunity from state taxation when the government allowed it to be placed in the plant of the Mesta Company; in that connection great stress is laid upon the decisions in Pennsylvania which hold that the tax here imposed is one on the mill or manufactory as a whole, and that tax assessors are not rejuired to investigate whether any part of the equipment belongs to someone other than the apparent owner. It need scarcely be said that the inconvenience which might be occasioned to tax assessors arising from any such duty of investigation (*Pennsylvania Company, Trustee,* v. *Bergson,* 307 Pa. 44, 51, 159 A. 32, 34) is not to be weighed against the right of an exempt owner. As far as private persons are concerned, Pennsylvania may, if it sees fit—either as a matter of practical expediency or of economic policy—tax land, building and equipment as a whole, regardless of the fact that parts of the property may be owned by other persons, and even by citizens of other states: *Coe* v. *Errol,* 116 U. S. 517. In the present case, however, we are dealing, not with expediency or policy, but with the constitutional *power* of Pennsylvania where the owner of part of the property taxed happens to be the United States. It is contended that, although machinery belonging to the government is not taxable so long as it retains its

status as personal property, it becomes locally taxable as real property when bolts are driven through it to the floor of the Mesta Company's mill. It is true, of course, that for certain purposes machinery affixed to a building is regarded by the law as though it were real estate, and, if privately owned, might properly be so regarded for purposes of taxation. Even if, however, it be deemed to be real property, it is real property belonging to the United States and therefore is not taxable. If the United States owned a *horizontal* islet of land in the middle of the plant, certainly no one would contend that that islet would be taxable; it may not be too fanciful to view this machinery as a piece of *vertical* real property belonging to the United States, and no more taxable, therefore, than it would be under the hypothesis suggested, for what difference should it make whether the property owned by the government be distinguished from that owned by the Mesta Company by horizontal or by vertical boundary lines? Such a distinction would subordinate actualities to a type of legalism unbefitting the purpose and art of constitutional interpretation. The important point is that, whatever the technical nomenclature ascribed to it, the machinery is owned by, and is an essential instrumentality of, the United States, and it cannot be deprived of the resulting immunity given it under our constitutional system merely because,

in order to facilitate its operation, it is necessary temporarily to fasten it to the floor of a mill. Such fastening still leaves it a distinct, individuated part of the property; it does not change its ownership, and it is *ownership* which is the criterion of taxability under the statute by which this tax is imposed. In short—to state the basic proposition in simple language—*the United States owns a distinct, clearly defined, tangible part of this mill and that part is exempt from local taxation.*

It is said in the majority opinion that "if the Mesta Company defaults in the payment of the tax, the paramount rights of the government in the machinery could not be divested or in any way affected." It seems to me that this very statement constitutes a back-handed acknowledgment of the weakness of the majority viewpoint. The Act of June 4, 1901, P. L. 364, provides that all taxes are first liens on the property taxed and that such liens shall be first paid out of the proceeds of any judicial sale of the property. In the admission, therefore, that this machinery cannot be *sold* by the taxing authority there is inherent the admission that it cannot be *taxed,* for, as was said in *Mint Realty Company* v. *Philadelphia,* 218 Pa. 104, 110, 66 A. 1130, 1132, "The power to tax implies the power to divest the title by a tax sale when there is default in the payment of the taxes levied," and in *Northern Pacific R. R. Co.* v. *Traill County,* 115 U. S. 600, 610, "A valid

sale * * * for taxes, being the highest exercise of sovereign power of the State, must carry the title to the property sold, and if it does not do this, it is because the assessment is void. It follows that, if the assessment of these taxes is valid * * * the sale confers a title paramount to all others, and thereby destroys the lien of the United States for the costs of surveying these lands. If, on the other hand, the sale would not confer such a title, it is because there exists no authority to make it." As already stated, there is no pretense that the tax here in question was on the interest, equitable or otherwise, of the Mesta Company in the machinery, not only because the company had no such interest apart from its right to use the machinery under its government contract, but because the tax admittedly was on the full value of the machinery, and was imposed upon the Mesta Company, not as user or possessor, but as owner of the mill. The situation, therefore, is quite different from that which existed in the case of *City of New Brunswick* v. *United States*, 276 U. S. 547, where the vendees of property, the title to which was in the United States, not only had a substantial interest therein, but had completed the payments to the government which entitled them to receive a deed to the property, and had thereby relegated the United States to the legal position of a quasi-mortgagee.

I take it that little, if anything, need be said in justification of the action of the court below in permitting the United States to intervene, for how else could it assert its rights? It is interested not only because it expressly contracted to reimburse the Mesta Company for the taxes which the latter might be required to pay, but because, even in the absence of such a contract, the Mesta Company could recover from it the amount of the tax on the machinery. "As between the real owner and the registered [that is, the nominal or apparent] owner, the latter is secondarily liable, and may, therefore, recover from the real owner sums by him paid on account of the tax": *Fidelity Philadelphia Trust Company, Trustee,* v. *Land Title Bank & Trust Co.,* 326 Pa. 262, 264, 192 A. 121, 122. Thus there is peculiarly applicable here the statements made by the court in *Colorado Bank* v. *Bedford,* 310 U. S. 41, 52, that "The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself." It is therefore clear that, just as in the Van Brocklin case and many others of those hereinbefore cited, the fact that the assessment of the tax is against the Mesta Company, and not the United States directly, is of no significance as far as the validity of the tax is concerned. The United States is the real party in interest, not because of any indirect shifting to it of the eco-

nomic burden of the tax, but because it is bound, even irrespective of its contract, to reimburse the Mesta Company, and it is therefore the real taxpayer involved. Of course, the Mesta Company also has the right, apart from that of the government, to resist the tax imposed upon it; it is not obliged to submit to an invalid levy and then seek reimbursement from the government.

Because, then, the tax which is sought here to be imposed is on property legally and beneficially in the sole ownership of the United States, and because also it is property which is an instrumentality vital to the execution of the war powers of the government, I do not think it an exaggeration to say, as was said by the court below: "That the taxing by a state or any of its subdivisions of property owned by the United States of America and used by it in carrying out a constitutional function constitutes a violation of the Constitution of the United States and of the principle of dual sovereignty upon which that Constitution is based, is no longer open to debate. The assessment and levy of such a tax is clearly invalid."

I would affirm the order of the Court of Common Pleas of Allegheny County.

Mr. Justice ALLEN M. STEARNE concurs in this opinion.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 417

THE UNITED STATES OF AMERICA AND MESTA MACHINE COMPANY, APPELLANTS

v.

COUNTY OF ALLEGHENY, PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Common Pleas of Allegheny County, Pennsylvania (R. 79), is unreported. The opinion of the Supreme Court of Pennsylvania (R. 95) is reported at 347 Pa. 191.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered May 12, 1943 (R. 90, 102). The appellants' petition for reargument was denied August 12, 1943 (R. 91, 123). The petition for allowance of an appeal was filed September 9,

1943 (R. 124), and the order of the Supreme Court of Pennsylvania allowing the appeal was entered September 15, 1943 (R. 125–126). This Court, by order of October 25, 1943, postponed further consideration of the question of jurisdiction until the hearing on the merits (R. 129). The jurisdiction of this Court rests on Section 237 (a) of the Judicial Code, as amended, and is supported by the authorities cited in Appellants' Statement as to Jurisdiction. Also see footnote 6, p. 13, *infra.*

QUESTION PRESENTED

Whether, under the Constitution of the United States, a Pennsylvania real property tax statute which authorizes a county to assess the machinery in a mill as a part of the real estate may validly be applied to machinery owned by the United States and located in a mill of a private person.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in Appendix A, *infra,* pp. 58–59.

STATEMENT

The facts were in large part stipulated and may be summarized as follows:

Mesta Machine Company is a Pennsylvania corporation, having its principal place of business in the Borough of West Homestead, County of Allegheny, Pennsylvania (R. 24). On or

about November 1, 1940, the Company entered into a contract with the United States, No. W-ORD-486, to manufacture for the United States a quantity of large field guns (R. 25). A copy of the contract, and of an amendment thereto, dated February 24, 1941, appears in the record (pp. 25, 35, 37–70. Ex. 1).[1]

The contract was in four parts or titles. Title I was a "Cost-plus-a-fixed-fee equipping" contract, and dealt with the procurement and installation of machinery and machine tools necessary for the manufacture of the guns in a building owned by Mesta, at the Government's expense (R. 41–48); Title II was a lease of this equipment by the United States to Mesta (R. 49–50); Title III was a fixed-price contract for actual manufacture of the guns (R. 51–59); Title IV contained definitions, stipulations respecting wages, hours, and working conditions, and other matters relating to the entire contract (R. 59–64), none of which is important to this controversy.

Under Title I, the necessary machinery was to be supplied in three possible ways: Under Article I–A Mesta, called the "Contractor," operating on a cost-plus-a-fixed-fee basis, could purchase the machinery, or it could produce the machinery

[1] On request of the War Department, there were deleted from the contract certain figures relating to quantities, size and costs of the guns, which should not be disclosed, but these are not material to the controversy.

itself (R. 41); but under Article I–D–2 the Government reserved the option to furnish any or all of the machinery if it so desired (R. 43). Article I–A further provided that Mesta should install all the machinery, or cause it to be installed, in Mesta's plant at West Homestead, Pennsylvania (R. 41).

Under these provisions, Mesta manufactured one machine and sold it directly to the United States (R. 26, 28–29). Eight gun-boring lathes and two rifling machines owned by the United States were sent to the Mesta building from the Watervliet Arsenal at Watervliet, New York (R. 23, 26, 31, 37, Ex. C). The remainder of the machinery was purchased by Mesta from other machine-tool manufacturers and was then resold by Mesta to the United States, through the process of reimbursement for cost under the contract (R. 26). All of the machinery was installed in the building owned by Mesta (R. 31).

The details of the purchase and delivery of the machinery not already owned by the Government are set forth in the record (pp. 26–31, 35, 70–78, Exs. 2–11). They show that each purchase was made with approval of a representative of the War Department, the Contracting Officer; that in each instance Mesta was reimbursed by the United States for the cost; and that in each instance the Contracting Officer, through his representative, the Officer in Charge, inspected and accepted the machinery.

Article I–H specified that title to all tools, machinery, equipment, and supplies purchased or furnished by Mesta should vest in the Government upon inspection and acceptance by the Contracting Officer at the scene of the work. The provision was as follows (R. 46):

> The title to all work under this Title I, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under this Title I shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract.

Article I–D of the contract provided as follows (R. 42):

> 1. The Contractor shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work under this Title I as may be approved or ratified by the Contracting Officer and as are included in the following items:
>
> (a) All labor, material, tools, machinery, equipment, supplies, services, power, and

fuel necessary for either temporary or permanent use for the benefit of the work under Title I.

* * * * *

Under Article I–C Mesta was awarded a fixed fee of $1 as consideration for performance of Title I (R. 42). A later amendment allowed substantial compensation for work done on the machinery furnished by the Government, above mentioned, which was already owned by the United States and which Mesta agreed to repair and recondition (R. 25, 35, 65–70, Ex. 1).

Article I–K empowered the United States to terminate the contract by notice in writing to Mesta at any time termination was deemed advisible or necessary in the interest of the Government (R. 47).

Title II of the contract, providing for leasing of the equipment to Mesta, read in part as follows (R. 49):

Article II–A—Subject Matter

1. The Government hereby leases to the Contractor the Government-owned equipment, which the Contractor will have installed pursuant to the provisions of Title I hereof.

2. The Contractor shall maintain and keep in repair the Government-owned equipment described in Title I hereof and leased to the Contractor hereby.

Article II–B—Term

1. The term of this lease shall be for the period during which Guns, * * * complete, are manufactured by the Contractor under Title III of this contract or any later supplement or amendment of this contract.

* * * * *

Article II–C—Rental

1. The Contractor agrees to pay to the Government in advance, as rental for the term herein created, the sum of One Dollar ($1.00).

By Article II–D–1 (R. 49), Mesta was prohibited from using any of the leased equipment for any purpose other than the manufacture of the guns, as provided in the contract. Article II–E stipulated that upon termination of the contract Mesta must remove the equipment from its plant and ship it, at the expense of the Government, to a point designated by a representative of the War Department. It reads as follows (R. 50):

In the event of termination of Title III of this contract, in accordance with the terms of Article III–K [2] of title III hereof, or in the event of complete performance of this contract by the Contractor and unless a new contract or contracts satisfactory to the Contractor as to price, delivery schedule, and quantities have been entered into

[2] Erroneously shown as II–K in the printed record.

and unless a contract to maintain the equipment in a stand-by condition has been entered into by the Government with the Contractor, the Contractor shall at the expense of the Government within ninety (90) days thereafter remove from the premises of the Contractor and ship by railroad to a point designated by the Contracting Officer all of the equipment leased to the Contractor for the performance of this contract, in good condition subject to fair wear and tear and depreciation.

Title III (R. 51–59) of the contract provided for the manufacture of guns at a fixed price per gun, and Article III–K, like Article I–K, specified that the contract was terminable by written notice to Mesta at the will of the Government (R. 57).

One of the assessors for the County who made the present assessment testified that the machinery was installed in such manner that it could be removed without any damage to the building (R. 21). There was no evidence to the contrary.

The real property owned by Mesta, on which the machinery and machine tools were installed, had already been valued and assessed in the triennial assessment previously made for the years 1940, 1941, and 1942. In January 1942, the Board of Property Assessment, Appeals, and Review revised this assessment, for the year 1942, increasing it by adding to the valuation, among other

items, the value of the machinery in question, fixed at $618,000 (R. 18, 23, 33, 34, 35–37, Exs. A, B, C).

The assessment was made under the Act of May 22, 1933, P. L. 853, as amended (72 P. S., Sec. 5020–201, *et seq.*), and particularly Section 201 thereof, which provides as follows:

> Subjects of Taxation Enumerated.—The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school, and poor purposes at the annual rate:
>
> (a) All real estate, to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries, and ferries, wharves, and all other real estate not exempt by law from taxation.
>
> * * * * *

After notice of the revision to Mesta and a hearing before the Board of Property Assessment, Appeals, and Review, the latter, on April 20, 1942, notified Mesta of its decision to maintain the assessment based upon the machinery (R. 33). Mesta filed an appeal to the Court of Common Pleas of Allegheny County on May 20, 1942 (R. 1).

Thereafter, on June 29, 1942, and again on July 29, 1942, at the request of the United States, the Board held further hearings and considered

objections to the tax urged on behalf of the United States and Mesta. On July 30, 1942, the Board advised Mesta that it reaffirmed its decision of April 20, 1942, to maintain the assessment. (R. 33–34.)

The tax attributable to the assessment of the machinery, amounting to $5,137.12, was paid by Mesta, under protest, on July 30, 1942 (R. 34).

On September 16, 1942, Mesta filed an amended petition of appeal to the Court of Common Pleas of Allegheny County (R. 2–4), and the United States filed a petition for leave to intervene (R. 5–8). The intervention was allowed on October 19, 1942 (R. 14), and the Government has participated in the litigation continuously since that date.[3]

Mesta's amended petition and the intervening petition of the United States attacked the assessment upon two grounds: First, they alleged that under the Pennsylvania real property tax statute machinery belonging to anyone other than the owner of a mill was not to be considered a part

[3] The petition for leave to intervene contained in paragraph 14 (R. 7–8) an allegation that the United States would be required to reimburse Mesta Machine Company for the amount of any taxes which the company might be required to pay on account of this assessment. The reimbursement provision upon which this allegation was based appears in Article I–D (g) of the contract (R. 43). Rule 2327, Pennsylvania Rules of Civil Procedure (see 337 Pa. 24a), permits any party to intervene where the entry of a judgment will impose upon such party a liability to indemnify the party against whom the judgment is entered.

of the mill for the purposes of real property tax assessments (R. 3, 7);[4] and second, that the applicable Pennsylvania taxing statutes, as construed and as here applied, were invalid because repugnant to the Federal Constitution (R. 4, 7). Under the practice pertaining to tax appeals like the present in Pennsylvania, the County was not required to file an answer on the merits of Mesta's petition, and filed none. Its only answer was in opposition to the Government's petition for leave to intervene (R. 8–9).

The Court of Common Pleas, in an opinion filed on January 18, 1943 (R. 79–89), held that the Pennsylvania real property tax statute, as properly construed, authorized the assessment of the machinery in a mill to the owner of the mill as a part of the real estate, whether the machinery belonged to the owner of the mill or to some other private person. But upon its finding that the machinery here involved was "owned by the United States" (R. 80), the court further held that under the Federal Constitution the statute; as so construed, could not validly authorize the assessment to Mesta of the machinery. The assessment was set aside (R. 89).

The County of Allegheny appealed to the Supreme Court of Pennsylvania, including as as-

[4] The property would not be subject to tax as personalty, for Pennsylvania imposes no tax upon tangible personal property. See *Patterson* v. *Delaware County*, 70 Pa. 381, and *Dravo Contr. Co.* v. *Grambling*, 45 Pa. Super. Ct. 72.

assignments of error the judgment and the admission of evidence of the Government's title to the machinery (R. 93–95). The County contended that the evidence was irrelevant because the assessment was not made against the Government or the Government's property, but against Mesta Machine Company, and that therefore the statute authorizing it did not offend the Constitution of the United States.[5]

On May 12, 1943, the Supreme Court affirmed the construction placed upon the statute by the Court of Common Pleas, as to which there is no further issue, but reversed its judgment on the constitutional question and restored the assess-

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[5] In its brief (p. 23) the County urged that the machinery became a part of Mesta's real estate upon installation thereon, and that the United States had only a "reversionary interest after the termination of the contract." This would seem an attempt to divest the United States of title to its property. But when this view was challenged at the oral argument, counsel for the County, in response to direct question of the Chief Justice, stated unequivocally that there was no contention that title to the property was in Mesta "except for tax purposes."

Although the record does not reflect the exact dates of acceptance and installation of all of the machinery, there is no doubt but that it was wholly accepted and installed before the assessment, which occurred in January 1942. *Supra*, pp. 4–5. This is also shown by the assessment itself, as well as by the testimony of the assessor, that he had inspected the machinery on the premises in October 1941 (R. 19). Consequently, the United States had become the owner of and had acquired legal title to all the machinery well before the assessment. No such question as that presented in *United States* v. *Alabama*, 313 U. S. 274, is involved in this case.

ment (R. 95–102). Two judges dissented (R. 102–110). The court recognized that at the time of the assessment the United States owned the machinery and that "legal title to it" was "actually in the Federal Government" (R. 100). The court nevertheless held the assessment valid, on the ground that it was not made against the Government but against an independent contractor, and could be collected as a personal liability of the latter without recourse to the property (R. 99–100).[6]

SPECIFICATION OF ERRORS TO BE URGED

The assignments of error are set out in the record, pp. 124–125. The Supreme Court of Pennsylvania erred:

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[6] In view of the court's holding, it seems clear that an appeal will lie under Section 237 (a) of the Judicial Code, as amended: The "validity" of the Pennsylvania statute was "drawn in question * * * on the ground of its being repugnant to the Constitution" of the United States by identical allegations in paragraph 7e of the petition of Mesta (R. 4), and paragraph 13e of the intervening petition of the United States (R. 7), and the decision of the State court was "in favor of" the "validity" of the statute. The following cases, among others, are believed to sustain the jurisdiction of the Court: *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643; *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151. If for reasons not apparent to us an appeal is not available, the appeal papers should be treated as a petition for certiorari under paragraphs (b) and (c) of Section 237 of the Judicial Code. *Memphis Gas Co.* v. *Beeler*, 315 U. S. 649. With respect to the importance of the problem presented, bearing upon the allowance of certiorari, we refer the Court to the discussion *infra*, pp. 51–54.

1. In holding that the Act of May 22, 1933, P. L. 853, Art. 2, including Sec. 201 thereof, as amended by the Act of July 2, 1941, P. L. 219, Sec. 1, is constitutional insofar as it purports to authorize the assessment to Mesta Machine Company of property owned by the United States.

2. In holding that the assessment of Government-owned machinery as a part of the real estate of Mesta Machine Company is not in violation of, or repugnant to, the Constitution of the United States.

3. In holding that the evidence of Government ownership of the machinery which was assessed to Mesta Machine Company was irrelevant, and therefore incompetent and inadmissible.

4. In failing to hold that the Act of May 22, 1933, P. L. 853, Art. 2, including Sec. 201 thereof, as amended by the Act of July 2, 1941, P. L. 219, Sec. 1, is unconstitutional as applied to property belonging to the United States.

5. In failing to hold that the assessment of Government-owned machinery to Mesta Machine Company was in violation of, and repugnant to, the Constitution of the United States, and therefore invalid and void.

6. In failing to hold that the evidence of Government owership of the machinery which was assessed to Mesta Machine Company was relevant and competent and properly admitted by the Court of Common Pleas of Allegheny County.

SUMMARY OF ARGUMENT

I

The tax was assessed under a Pennsylvania statute which, as construed, provides that machinery shall be regarded as a part of the real estate upon which it is located and that the value of the real estate may be taxed to the registered owner, here the Mesta Machine Company. The Pennsylvania law taxes only the full ownership interest. Accordingly, the full assessable value of machinery owned by the United States was included in the instant assessment. In normal operation the tax becomes a first lien upon property subject to assessment and may be satisfied by a sale.

The scheme of the Pennsylvania law is to tax the real owner of the property. The record title holder is personally liable, but the taxing authority, if it so elects, may proceed directly against the real owner. And as between the real owner and the registered owner the latter is but secondarily liable and may recover from the real owner any payments made on account of the tax. In short, the tax is upon the real owner of the property. Under the decisions of the Supreme Court of Pennsylvania property of the Commonwealth situated as was the property of the Federal Government here probably could not be subjected to a county tax.

In this case, the state court apparently ignored the scheme of its own law and regarded Mesta as

the real taxpayer. But the court did not question any of its previous decisions dealing with the nature of the tax. The state court did not say whether in the present situation the Pennsylvania law purports to give Mesta a right of reimbursement for the tax against the United States. If it does, it is clear at once that the state law places the tax on the Government. But if it does not, the Pennsylvania law discriminates against Mesta solely because of its dealings with the Federal Government, since to all other persons similarly situated a remedy of reimbursement is provided. And that such a discriminatory exaction is invalid is clear. The Government could neutralize the discrimination by reimbursing Mesta for the tax, but this circumstance is of no avail to save the statute unless the state could impose a tax, collectible through the contractor, upon the United States in the first place. Thus, whether or not in the circumstances of the instant case the state law purports to give Mesta a right of reimbursement against the United States, we are faced with the same question. That question is whether a state property tax is invalid, though collectible from a private person who deals with the United States, where the tax is on the property of the United States and, apart from the fact of ownership by the United States, such private person and the state itself could, under the state law, require payment from the owner.

II

For 125 years no decision of this Court has questioned that, in the absence of congressional consent, the Government's activities and its property, real or personal, are immune from taxation by the states and their political subdivisions. The Government's immunity stems from the structure and implications of the Federal Constitution and the supremacy clause of Article VI. With respect to the Government's property, the immunity is further strengthened by Section 3 of Article IV, which grants to Congress the power to make "all" needful rules and regulations respecting such property. As with analogous decisions under the Commerce Clause, both Congress and the states have accommodated their laws to the decisions of the Court holding the Government's property immune from taxation.

There are intensely practical reasons supporting the Government's immunity from state and local taxation. Unlike the case of private persons, the activities and property of the general government are those of all the people and they are not dependent upon the authority or protection of any state. The claim that the Government should pay a price for conducting activities or maintaining property within the boundaries of a state overlooks the benefits and protections afforded the states by the Federal Government, whether in peace or in war, and denies the very basis of the

federation. State taxation of the Federal Government serves to appropriate the property of the whole for the benefit of a part. A second practical basis of the Government's immunity rests in the welter of administrative difficulties which would inevitably follow if the Government were to be subjected to the contradictory requirements of state legislation. Nor can the argument be successfully maintained that the Government should be subjected to state taxation, but that in deference to the federal principle there should be no authority of enforcement against it. It must be presumed that the Government will attempt to comply with requirements which the states may *constitutionally* impose. Mere immunity from enforcement, moreover, would in many circumstances be no immunity at all since the states would be free to proceed against private persons with whom the Government deals. The Court has never held that the Government's immunity from taxation is merely coincidental with its immunity from suit or the immunity of its property from seizure.

At least since *Van Brocklin* v. *State of Tennessee,* 117 U. S. 151, it has been settled explicity that a state may not impose an *ad valorem* tax upon property of the United States even where it proceeds solely against a private person for collection. The line of decisions represented by this case is of unshaken authority and is firmly grounded in the practical bases of the Govern-

ment's immunity. In the instant case the Government has contracted to reimburse Mesta for any "applicable" state and local taxes which it may be required to pay with respect to the Government's property. However, the Government's immunity does not arise from this or any other contract. The decisive fact is simply that it is the Government's property which is involved and, Congress not consenting, an *ad valorem* tax upon that property cannot be sustained.

If the foregoing circumstance were not sufficient in itself, the instant tax would fall for another reason. The tax is not imposed upon the contractor as a part of the price which he must pay for the benefits and protection afforded him by state authority. Under the scheme of the Pennsylvania law, the record title holder serves as a mere conduit for the imposition of that burden of citizenship upon the real owner of the property, the person in the position here of the United States. In the several cases in which this Court has sustained excises upon a contractor's business or income, the tax has in fact been upon him and not upon someone else. Where the tax has been upon the person in the position which the Government occupies in the particular transaction under scrutiny, the tax has been held invalid.

Congress has long understood that absent action on its part the Government's property is immune from state and local taxation. When believing

such action advisable, Congress has framed specific legislation to waive the Government's immunity in certain situations or to authorize payments in lieu of taxes. Congress plainly has not waived the immunity of the property involved in this case. In fact, Congress has repeatedly refused to adopt bills which would subject property acquired by the Government under the war program to state and local taxation even where, unlike the instant situation, the same property had previously been carried on the tax rolls.

The entire problem of the extent to which the Federal Government should make contributions to state and local governments is extremely complex. The fact is that state revenues have benefitted exceedingly in consequence of the unusually high level of business activity due to the war effort. Through only the War and Navy Departments and the Maritime Commission, the Government owns at the present time about $7,500,000,000 in property which is located on private lands or which is operated by private contractors. Whether, or to what extent, this vast holding should be subjected to state and local taxation would seem to be at the very least a matter of fair legislative debate. The nature of the problem brings further support to the long line of decisions of this Court holding the Government's property immune in the absence of express treatment of a particular situation by legislative action

The critical facts are simple. The Federal Government owned eight gun-boring lathes and certain rifling machines as a part of its stocks at the Watervliet Arsenal, New York. It caused these and other machinery, legal title to which was acquired by the Federal Government and which is on the same footing as the Watervliet machines,[7] to be installed in a mill owned by the Mesta Machine Company in Allegheny County, Pennsylvania. This was done pursuant to a contract under which Mesta was to manufacture large field guns for the United States Army. The machinery was "leased" to Mesta at the nominal rental of one dollar. It could be used only for work on the field guns, and the entire contract could be terminated at any time on the Government's election. Upon the termination of the contract the machinery, which could readily be removed, was to be withdrawn from the mill and put to such further use as its owner, the Government, desired.

A further fact requires brief notice. By force of Article I–D (g) of the contract (R. 43), the Government was required to reimburse Mesta for any "applicable" state or local taxes paid on account of the contract on "plant" or "equip-

[7] See pp. 4–5, 11–13, including footnote 5, p. 12, *supra*. As stated, the trial court found that the machinery was owned by the Federal Government (R. 80), and the Supreme Court of Pennsylvania did not question this fact (R. 100).

ment." If the tax here involved is valid, it will be the Government, not Mesta, which is out of pocket. We refer to this further, *infra*, p. 40. This fact was important in supporting the right of the United States to intervene in the state court (R. 9–14). But our position should be made perfectly clear. The immunity of the Government's property from state and local taxation which we assert does not rest on the contractual obligation of reimbursement. The Government has not contracted itself into an immunity. The immunity arises simply because it is the Government's property which is taxed.

I

THE NATURE OF THE PENNSYLVANIA TAX

The tax was assessed under the purported authority of the Pennsylvania Act of May 22, 1933, P. L. 853, Article II, Section 201, as amended by the Act of July 2, 1941, P. L. 219, Section 1 (Appendix A, *infra*, p. 58). The tax, at least in many aspects, is the traditional type of real property exaction. The 1933 Act, as amended, provides that all "real estate," including "mills," shall be "valued" and assessed. The Pennsylvania statutes do not authorize the taxation of any interest in such property less than the full ownership interest (*Mint Realty Co.* v. *Philadelphia*, 218 Pa. 104, 112–113). As both opinions in the state su-

preme court recognized (R. 96, 104), the assessment included the full assessable value of the Government-owned machinery, listed at $618,000 (R. 16–17, 23, 33, 35–36, 36–37, Exs. A, B, C).

In the state courts, the Government and Mesta raised questions whether the Pennsylvania statutes authorized the taxation of machinery as real estate, and, if so, whether they authorized taxation of machinery to the owner of the land where the machinery was in fact owned by another, and particularly where, as here, it was owned by the United States. The state supreme court held against the Government and Mesta on these issues (R. 97–99); presenting questions of statutory construction, they are not here for review. But in so applying the state statutes the supreme court, as we have seen, did not deny that the United States was the true owner of the machinery.* The majority of the court did not rule that Mesta had any legal or equitable interest in the machinery (R. 98–99), and the minority pointed out that "be-

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*Of course, no state by statute or decision can divest the United States of any interest in its property. See *Board of Comm'rs* v. *United States*, 308 U. S. 343, 350; *Carpenter* v. *Shaw*, 280 U. S. 363, 367; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389. Moreover, it may be noted that the assessment of January 1942 was not made on the theory that the Government's machinery merely enhanced the value of the land and buildings concededly owned by Mesta. The machinery was listed as a separate, taxable item. (R. 18–19, 22–23, 35–37.)

fore, at, and ever since the imposition of the tax, not only the legal title but the entire beneficial ownership of the machinery was solely in the United States" (R. 104). The court held simply that "for tax purposes" (R. 98, 100) the machinery was to be regarded "as the property of the Mesta Company." So far as the constitutional question of immunity before this Court is concerned, it is plainly immaterial whether Pennsylvania law regards the machinery as real estate or personalty, or whether for some purposes it chooses to attribute ownership to the true owner, the Federal Government, or to someone else, as a fictional owner.

Consistent with its character as a property tax, the Pennsylvania statutes provide that the tax shall become a first lien on the property subject to assessment, and may be satisfied by a sale of the property. Act of June 4, 1901, P. L. 364 (Appendix A, *infra*, pp. 58–59); *Mint Realty Co.* v. *Pennsylvania, supra.* The state court did not question the fact that, by force of Pennsylvania

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• This is underscored by the court's holding (R. 99) that—

"The record showed that title to the land was in the Mesta Company, and the assessor was not obliged to go further,"

as well as by its statement (R. 100) that the machinery was a proper subject of taxation although "legal title to it is actually in the Federal Government," and by its holding (R. 102) that evidence of the actual ownership was *irrelevant* and *improperly admitted*.

law, the tax here involved carried with it a first lien on the machinery or that, in normal operation, the machinery could be sold to satisfy the tax. It stated, however, that "the paramount rights of the government in the machinery could not be divested or in any way affected" (R. 100), and apparently considered this sufficient to sustain the tax.[10]

The scheme of the Pennsylvania statutes is to tax the real owner of the property. "It is the policy of the law to make the real owner pay the tax * * *" (*Pennsylvania Co.* v. *Bergson*, 307 Pa. 44, 53). The record title holder becomes personally liable for the tax (307 Pa. at p. 51; *N. Phila. Tr. Co.* v. *Heinel Bros., Inc.*, 315 Pa. 385; *Trust Co.* v. *Bank and Tr. Co.*, 326 Pa. 262, 264). But the taxing authority, if it so elects, may proceed directly against the real owner (307 Pa. at pp. 52–53; 326 Pa. at pp. 264–265; *Pennsylvania Stave Company's Appeal*, 236 Pa. 97; *Bemis* v. *Shipe*, 26 Pa. Super. Ct. 42), and the court recognized this to be true in its opinion in the instant

[10] To this the dissenting opinion in the court below responded (R. 108) that the admission that the Government's machinery could not be sold for taxes constituted "a backhanded acknowledgment of the weakness of the majority viewpoint," since the property was subjected to a lien under Pennsylvania law and, absent any question of immunity, could have been sold to satisfy the tax. Also see the dissenting opinion at R. 107–109. We think the minority's point was well taken. (See *infra*, pp. 28–31, 36.)

case (R. 99). Moreover, "as between the real owner and the registered owner, the latter is secondarily liable and may therefore recover from the real owner sums by him paid on account of the tax" (*Trust Co.* v. *Bank and Tr. Co., supra;* see *Pennsylvania Co.* v. *Bergson,* 307 Pa. at p. 53). As between lessee and lessor, a statute expressly so provides. Act of April 3, 1804, P. L. 517 (Appendix A, *infra,* p. 59). It is thus abundantly clear that the practice of collecting from the record title holder the taxes imposed upon another's property is nothing more than a device to save the local tax officers "trouble and expense" (307 Pa. at p. 51) and so to aid in the "effective administration" (*Id.,* at p. 56) of the tax law.[11] In analyzing state taxing statutes, this Court has looked to the person ultimately liable for payment of the tax and has determined whether, absent the immunity question, that liability was on the person in the position of the private party (Mesta, here) or on the person in the position of the United States. See e. g., *Alabama* v. *King & Boozer,* 314 U. S. 1, 9–14; *Curry* v. *United States,* 314 U. S. 14, 17, 18.[12] There would seem to be no

[11] The device is not unusual. For discussion of a similar statute see *Boston* v. *Quincy Market Cold Storage Co.,* 312 Mass. 638.

[12] In the *Curry* case, the Court sustained a state use tax collected from contractors as purchasers, reasoning that it was laid "upon them [the contractors] rather than the indi-

question that, apart from any question of immunity, ultimate liability for payment of the Pennsylvania tax is on the actual owner of the property and hence on the person in the position of the Government here.

It is of some significance in this connection that the state supreme court apparently refuses to permit the taxation of property owned by the state or its subdivisions in circumstances analogous to those here. See *Dornan* v. *Phila. Housing Authority,* 331 Pa. 209; *Com. State Emp. System* v. *Dau. Co.,* 335 Pa. 177. The first case involved the right of the state to exempt from local taxes a slum-clearance project. The second involved a county assessment against property owned by the state on behalf of the State Employe's Retirement System, a portion of which was rented to private commercial tenants. In both the property was held exempt from county taxes notwithstanding a provision found in Article IX of the Pennsylvania Constitution forbidding the grant of exemption to property not used for public purposes. In the second case, the court said (p. 185):

> The fact that revenue is derived from the property or that it is leased for private use does not preclude the existence of a public use by the Commonwealth.

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vidual [there, the Government] with whom they enter into a cost-plus contract like the present one * * *" (p. 18).

In the present case, the court below cited two Pennsylvania cases where a tax was sustained (R. 101). But in both it was a private person, and not the state or a subdivision, who owned the property actually taxed. *County of Franklin* v. *McClean*, 93 Pa. Super. Ct. 165; *Kittanning Academy* v. *Kittanning Boro.*, 8 Pa. Super. Ct. 27.[13]

As an integral part of the scheme of taxing the real owner, the state law, as we have seen, gives the record title holder a right of reimbursement against the real owner. Although acknowledging that the Government's ownership of the property could not be affected by the state (*supra*, p. 25), the court failed to say whether in the present situation the state law purports to give Mesta a right of reimbursement against the United States. Consistent with its silence on this point, the court apparently sought to ignore the normal operation of its own law and to portray Mesta as the real taxpayer (R. 100). But the court did not question any of its previous decisions

[13] In the *McClean* case the "property assessed for taxation" was "a house situated upon leased land" owned by the Commonwealth. The private lessee owned the house and had the right to remove it at the end of the lease. (93 Pa. Super. Ct. at pp. 167, 171.) The dissenting opinion, also, noted this case (R. 106).

Of course, even if the Pennsylvania law were otherwise this would have no direct bearing on the constitutional question presented here, for a state is free to tax its own property as it chooses.

dealing with the nature of the tax and it can make no difference whether or not the state law purports to give Mesta a remedy of reimbursement against the United States. If it does purport to give Mesta such a remedy, it is evident at once that the scheme of the state law is to place the tax on the Government. But if, because Mesta deals with the United States, the state law fails to give it a remedy of reimbursement which is available to all others in similar dealings with private individuals, there is a patent discrimination solely because Mesta does business with the Federal Government. And that even a tax imposed solely upon a private person is invalid under the immunity rule if it discriminates because of dealings with the Government is clear. In this situation, to be sure, the Government could neutralize the reluctance of contractors to deal with it, which would inevitably be occasioned by the difference in the treatment accorded them under state law, by agreeing to reimburse them for the tax. But this would not validate the tax, it seems obvious, unless the state could validly impose a tax upon the Government, collectible through the contractor, in the first place. *Miller* v. *Milwaukee*, 272 U. S. 713.[14] Thus, starting with

[14] This case held invalid a state income tax on a shareholder as applied to dividends allocable to corporate income consisting of interest on United States bonds. The corporation could not be taxed on such interest, due to an express exemption provided by federal law. The scheme

the assumption that the state law does not give the contractor a right of reimbursement against the Government, we end up at the same unanswered question to which the contrary assumption leads us, namely whether the County may enforce against the contractor a tax which is on the person in the position of the Government, and which, absent any question of immunity, would be

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of the state law was to tax income to corporations, but it provided that where income was exempt in the hands of the corporation, dividends allocable to such corporate income should be taxed to the shareholder. On this basis the state sought to sustain the tax. The opinion of the Court, delivered by Mr. Justice Holmes, reasoned that the tax on the shareholder was discriminatory, since dividends allocable to Government bond interest were taxed and other dividends were not. A concurring opinion, joined in by Justices Brandeis and Stone, reasoned that the tax was invalid because the state was seeking indirectly, by taxing the dividend in hands of the shareholder, to impose the forbidden tax on Government bond interest.

For purposes of the present case, we think it unnecessary to choose between these two grounds of decision. The decisive question in the *Miller* case, under either view, was whether Government bond interest could be taxed in the hands of the recipient, the corporation. Since it could not be, the tax was not saved by shifting it to the dividend in the hands of the shareholder. Similarly, the decisive question in this aspect of the present case is whether Government property can be subjected to a tax collectible from a record title holder who is then given a right over against the real owner. If it cannot be, the tax cannot be saved by denying the record title holder a right of reimbursement because the United States is the owner of the property, and thus shifting the tax to the contractor.

on the Government. See *Alabama* v. *King & Boozer*, and *Curry* v. *United States, supra*, (p. 26). This we discuss, *infra* (pp. 41–47).

II

ABSENT THE CONSENT OF CONGRESS, THE PROPERTY OF THE FEDERAL GOVERNMENT IS CONSTITUTIONALLY IMMUNE FROM STATE AND LOCAL TAXATION. THE IMMUNITY IS NOT DISSIPATED BY THE ELECTION OF THE TAXING AUTHORITY TO PROCEED AGAINST SOMEONE ELSE FOR COLLECTION

Since *McCulloch* v. *Maryland*, 4 Wheat. 316, no decision of the Court has questioned that, lacking congressional consent, the Government's activities and property, real or personal, are immune from taxation by the states and their political subdivisions.[15] Illustrative decisions holding the Government's property immune are: *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151;[16] *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496; *United States* v. *Rickert*, 188 U. S. 432; *Irwin* v.

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[15] Two unreported cases to the contrary were apparently affirmed by an equally divided Court at the December Term, 1849. Their facts are stated in *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 175–177. One, *United States* v. *Portland*, resulted in the dismissal of a suit by the United States to recover taxes paid on a customs building; the other, *Roach* v. *Philadelphia County*, affirmed a decision that the United States was liable to local taxation on the U. S. Mint. These decisions, as pointed out in the *Van Brocklin* case, have no weight as authority.

[16] See particularly 117 U. S. at pp. 156–158 for Mr. Justice Gray's discussion of the views of the Marshall Court con-

Wright, 258 U. S. 219; *Clallam County* v. *United States*, 263 U. S. 341; *Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643; *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89; *Maricopa County* v. *Valley Bank*, 318 U. S. 357; *Mayo* v. *United States*, 319 U. S. 441. In general, the Government's immunity stems from the structure and implications of the Federal Constitution and the supremacy clause of Article VI. With respect to the Government's property, the immunity is buttressed by Section 3 of Article IV, Clause 2, which grants to Congress the power to make "all needful rules and regulations respecting * * * property belonging to the United States * * *".[17] The power to make "all" needful rules and regulations is an exclusive authority. *Wisconsin Railroad Co.* v. *Price County, supra*, at p. 504; see also *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600, 610.

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cerning the immunity of the Government's property, as distinct from the property of a Government "agent" who had his own private purposes to serve.

[17] Compare the language of the Commerce Clause, Article I, Section 8, which does not in terms bar state regulation of interstate commerce prior to congressional action. Notwithstanding, where uniform rules national in scope are required, the states may not act even where Congress is silent. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Welton* v. *State of Missouri*, 91 U. S. 275, 282; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 212; *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 307; *Kelly* v. *Washington*, 302 U. S. 1, 14; *Milk Board* v. *Eisenberg Co.*, 306 U. S. 346, 351.

Even if it were conceivable that the law of the Constitution might have developed otherwise, so as to subject the Government to at least non-discriminatory state taxation until Congress declared it immune, the principle is now well and firmly imbedded in constitutional law. As with analogous decisions holding interstate commerce free from state taxation or regulation in the absence of congressional consent, "Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system" (*Gwin, Etc., Inc.* v. *Henneford*, 305 U. S. 434, 441). In fact, some 40 states have "accommodated" their laws to the rule that the property of the United States is not subject to the taxing power of the state, some by constitution [18] (or by constitution and statute) and others by statute alone.[19]

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[18] The constitutional provisions are as follows: Arizona, Art. 9, Sec. 2; California, Art. 13, Sec. 1; Idaho, Art. 7, Sec. 4; Missouri, Art. 14, Sec. 1; Montana, Art. 12, Sec. 2; Nevada, Sec. 20 (3); New Mexico, Art. 8, Sec. 3; North Dakota, Sec. 176; Oklahoma, Art. 1, Sec. 3 and Art. 10, Sec. 6; South Dakota, Art. 11, Sec. 5; Utah, Art. 13, Sec. 2; Virginia, Sec. 183; Washington, Art. 7, Sec. 2; Wisconsin, Art. 2, Sec. 2; Wyoming, Art. 15, Sec. 12.

[19] The statutes are as follows: 51 Code of Alabama (1940), Sec. 2; Pope's Digest of the Statute of Arkansas (1937), Sec. 13603; 4 Colorado Statutes, Annotated (1935), c. 168, Sec. 4; General Statutes of Connecticut (1930), c. 62, Sec. 1163; Revised Code of Delaware (1935), c. 44, Sec. 1258 (1); Florida Statutes (1941), Sec. 192.06; Illinois Revised Statutes (1941), c. 120, Sec. 500; Burns' Indiana Statutes Annotated (1937), Secs. 64–201; Code of Iowa (1939), Sec. 6944; General

The practical bases of the Government's immunity.—The practical bases of the Government's immunity have been variously stated but, we believe, may be reduced to these: The activities and property of private persons within a state rightly answer to the tax collector in return for the benefits and protection afforded by state authority. The activities and property of the Federal Government, on the other hand, are those of all the people. The activities are not carried on and the property does not exist by the authority of any single state. To claim that the Government should pay a price for conducting activities or maintaining property within a state denies the very basis of our federalism. Any benefits or protection afforded the Government by state authority are compensated, *ex hypothesi,* by the benefits and

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Statutes of Kansas, Annotated (1935), Sec. 79-201; Revised Statutes of Maine (1930), c. 13, Sec. 6; 1 Mason's Michigan Code (1929), Sec. 3395; Mississippi Code (1938 Supp.), c. 61, Sec. 317; 1 Public Laws of New Hampshire (1926), c. 60, Sec. 5; 2 Revised Statutes of New Jersey (1937), Sec. 54: 4-3.3; McKinney's Consolidated Laws of New York, Annotated, Tax Law 59, Art. 1, Sec. 4; North Carolina Code (Michie, 1939), Sec. 7971 (129), (130); 4 Throckmorton's Ohio Code Annotated (1938), Sec. 5351; 7 Oregon Compiled Laws Annotated (1941), Sec. 110-201; 53 Purdon's Pennsylvania Statutes (1936), Sec. 2025; General Laws of Rhode Island (1938), c. 29, Sec. 2; 2 Code of Laws of South Carolina (1942), Sec. 2578; Tennessee Code Annotated (Michie, 1932), Sec. 1085; Vernon's Texas Statutes (1936), Sec. 7150; Public Laws of Vermont (1933), Sec. 590; West Virginia Code (Michie, 1937), Sec. 678.

protection afforded the states by the Federal Government—a consideration which loses none of its force during a critical war. State taxation of the Federal Government necessarily appropriates the property of all, dedicated to national objectives, for the benefit of a part. See *McCulloch* v. *Maryland*, 4 Wheat. at pp. 435–436; *Van Brocklin* v. *State of Tennessee*, 117 U. S. at pp. 155–156; *Helvering* v. *Gerhardt*, 304 U. S. 405, 412.

A second practical basis of the immunity rests in the host of administrative difficulties which would inevitably follow if the Government were to be subjected to the conflicting requirements of state legislation. Even where no unseemly conflicts developed between federal and local officials, no small part of the Government's time would be devoted to the filing of returns, the checking of assessments, the institution of review proceedings, applications for licenses, and the satisfaction of the varied other requirements which are wound up with modern taxation and regulation. The rule of immunity "rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other" (*Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 523). The immunity of the Federal Government is required "to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements" (*Mayo* v. *United States*, 319 U. S. 441, 445).

Moreover, these practical needs could not be satisfied by a mere immunity from suit or enforcement, as distinct from taxation. It must be presumed that the Federal Government will strive to comply with requirements which the states may *constitutionally* impose, even though this results in diverting the property of all for the benefit of a few and leaves in its wake administrative problems of great complexity. A mere immunity of the Government from enforcement would in many circumstances be no immunity at all, since states would be free to proceed against private persons with whom the Government deals, or who carry out its work, for the collection of taxes imposed in fact on the United States. The cases have fully recognized the distinction between immunity from suit or enforcement and immunity from taxation or regulation. Cf. *United States* v. *Alabama*, 313 U. S. 274, and *National Bank* v. *Commonwealth*, 9 Wall. 353, with *Van Brocklin* v. *State of Tennessee, supra.* See *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 235; *New Brunswick* v. *United States*, 276 U. S. 547. No case has held that the Government's immunity from taxation is merely coterminous with its immunity from suit or the immunity of its property from seizure.

The decisions invalidating a tax against a private person.—Of the cases cited at pp. 31–32, *supra*, holding the Government's property immune from state taxation, only two (*Clallam County* v. *United*

States, and *Mayo* v. *United States*) involved attempts to collect taxes or fees directly from the United States. In the others it was private persons against whom the local authority proceeded for collection.[20] In the *Van Brocklin* case, which is typical of several, the United States obtained title to three lots upon nonpayment of federal taxes, and held them for some 13 years. After one lot had been redeemed by Van Brocklin and the others sold, the state brought a bill in equity against Van Brocklin and the purchasers to enforce by sale liens for taxes assessed with respect to the years when title was in the United States. It was held that the property was not subject to the asserted liens.

In the *Maricopa County* case, *supra*, decided at the last Term, it was a bank which the county sought to hold liable for the tax. The tax, however, was a personal property tax on the bank's shares, and the shares in question were owned by

[20] Other cases invalidating assessments against third persons are: *Railway Co.* v. *Prescott*, 16 Wall. 603; *Railway Co.* v. *McShane*, 22 Wall. 444; *Colorado Co.* v. *Commissioners*, 95 U. S. 259; *Sargent* v. *Herrick*, 221 U. S. 404; *Huesman* v. *Durham*, 165 U. S. 144; *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600. For cases where the tax was sustained because equitable title to the entire property during the tax period was vested in the person assessed, see *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Northern Pacific Railway* v. *Myers*, 172 U. S. 589; *Bothwell* v. *Bingham County*, 237 U. S. 642; *New Brunswick* v. *United States*, 276 U. S. 547; *Exchange Trust Co.* v. *Drainage Dist.*, 278 U. S. 421.

the Reconstruction Finance Corporation. Moreover, upon payment, the bank, under Arizona law, was entitled to reimbursement from the shareholder.[21] This Court viewed the tax, not as on the bank, but as on the Reconstruction Finance Corporation. It affirmed an injunction enjoining collection from the bank, since congressional consent to the taxation of the shares in the hands of the Reconstruction Finance Corporation, "though previously granted, has now been withdrawn" (318 U. S. at p. 362).[22]

This line of cases is of unshaken authority and seems rooted in the needs of government. Although in these situations the Government's

[21] The case did not seem to turn on the ultimate liability for payment of the tax but on the fact that it was imposed and measured upon property of the Reconstruction Finance Corporation, without more. To the extent that ultimate liability for payment of the tax was considered important, the case should be considered in connection with those cited *infra*, pp. 42, 44–45.

[22] In *Mayo* v. *United States*, 319 U. S. 441, the state's "stop sale" notice was directed to a federal instrumentality, the county agricultural association, rather than to a private person. But it is perfectly clear from the opinion that the state's action would not have been viewed in a more favorable light had the state officials waited until the bags of fertilizer were in the hands of the farmers, and then seized and sold them for lack of labels evidencing payment of the inspection fee. The district court's decree, affirmed by this Court, was sufficiently broad to prevent such interference with the Government's program at any point. See Record in No. 726, October Term, 1941, pp. 116–117. The Court's opinion cited with approval the *Van Brocklin* case (319 U. S. at p. 447, footnote 11).

property is not handed over directly to the state, the appropriation is nonetheless clear. Thus, in the *Van Brocklin* case the Government had parted with all its interest in the property before the state pressed its claim. But if the state's position had been sustained—so that liens, although dormant while the property remained in the Government, could accumulate during its tenure, and become enforceable upon sale of the property to a private individual—the Government's property in all subsequent instances would obviously have been subjected to a tax in fact if not in form.[23] This was explicitly recognized in *Lee* v. *Osceola Imp. Dist., supra,* where an assessment for local improvements was made against a purchaser of land from the Government after the sale, but for years during which the United States held title. The tax was held invalid as an attempt to "accomplish indirectly the collection of a tax against the United States" (p. 645). And the interference would be even clearer if such a tax were permissible where the Government placed property in the

[23] The same result would have followed, clearly, if the purchaser as transferee had been held liable for a tax accruing during the Government's tenure on some other theory, apart from any question of liens. In the present case the state court did not specify whether in its view a lien attached to the machinery which could be enforced upon any sale of the property to a private purchaser. Presumably this was its view, since under Pennsylvania law a lien attaches to property subject to the tax. In any event, the state court did hold Mesta liable for the tax.

hands of an individual only temporarily, in order to secure its more effective use. In such a case, indeed, the private individual would be unlikely to proceed unless the Government first assumed the liability for the tax, just as the "numerous persons" referred to in the *Mayo* case (319 U. S. at p. 443) were unwilling "to proceed with the distribution of the fertilizer" without protection from the Florida statute. It is to be noted that such an agreement of indemnification was given Mesta in the instant case by its contract (*supra*, p. 22). And in all of these situations the Government, as the real party in interest, is subjected to the same administrative burdens as though the tax were collected directly from the Treasury.[24]

The foregoing decisions establish the general rule that a tax on the Government's property is invalid, and is not saved merely because collection is sought from someone else. The recent decisions of the Court sustaining taxation or regulation of persons who deal with the Government do not take the instant case out of the general rule. This is so both because those decisions did not deal with a tax on the Government's property, and because the scheme

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[24] In the only two similar cases arising in state courts prior to the present proceeding it was held that Government property situated on privately owned land was immune from state taxation, even though collection was sought from the owner of the land. *Andrews* v. *The Auditor*, 69 Va. 115; *People ex rel. Donner-Union Coke Corp.* v. *Burke*, 204 App. Div. 557, affirmed, 236 N. Y. 650. And see Note (1943), 56 Harv. L. Rev. 1332.

of the Pennsylvania law is not to tax the contractor but the owner of the property. The rationale of those decisions supports our position. To them we now turn.

The decisions sustaining a tax against a private person.—In shaping the rule of inter-governmental immunity it has been necessary to reckon with "the competing principle," as it was characterized in *Helvering* v. *Producers Corp.*, 303 U. S. 376, 385, that the power of the government (state or federal) be not crippled and its police power not unduly curtailed. At times the immunity principle has been applied so single-mindedly as to be pressed far beyond its proper confines, so that the immunity became less a protection for the government than a benefit to the individual who dealt with or worked for it.[25] Since *James* v. *Dravo Contracting Co.*, 302 U. S. 134, there has been a distinct narrowing of the area of immunity. For example, in the interest of preserving tax sources and the operation of state police power in such vital matters as the stabilization of milk supplies through price control, it is today held that a contractor is not relieved from nondiscriminatory taxation or regulation despite incidental effects on the Federal

[25] See *Taxation of Government Bondholders and Employees—the Immunity Rule and the Sixteenth Amendment—a Study Made by the Department of Justice*, Washington (1938).

Government. *James* v. *Dravo Contracting Co., supra; Alabama* v. *King & Boozer,* 314 U. S. 1; *Curry* v. *United States,* 314 U. S. 14; *Penn Dairies* v. *Milk Control Comm'n,* 318 U. S. 261. The Court stated in the *Penn Dairies case,* 318 U. S. at p. 269, "* * * the mere fact that nondiscriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation."

The foregoing cases all have a single common denominator. The tax cases dealt with excise or privilege taxes. In each case the subject matter of the tax—the receipt of gross income by the contractor, or his purchase or use of materials—was the measure of payment exacted of all persons similarly situated in return for benefits and protection unquestionably afforded them by the state. In the *Penn Dairies* case, the regulation was applicable to all dealers in aid of a general program designed to assure a stable supply of milk. Apart from the contractual relation between the individual and the Federal Government, the tax or regulation in each of the cases above referred to was plainly applicable to him. But the contractual relationship was not sufficient to give the contractor the status of the Government. In the *Penn Dairies* case, for example,

the dealer was selling milk for himself and not for the Government. Similarly, the Court pointed out in the *King & Boozer* case (314 U. S. at pp. 10–12, 13) that the contractor had no authority to pledge the Government's credit, and that he alone, and not the Government, was the purchaser upon which the tax was imposed. See *Mayo* v. *United States*, 319 U. S. at p. 447.

The basic assumption of all of these cases was that taxation or regulation of the Government itself is invalid. See the *Penn Dairies* case, 318 U. S. at p. 269. Moreover, it was not enough to sustain the tax or regulation that it was the contractor, rather than the Government, who was the immediate object of state power. (In fact, in *King & Boozer* the sales tax was not collected by the state even from the contractor, but from the contractor's vendor.) Rather it appeared in each case that the tax or regulation was imposed upon the contractor as a part of *his* obligation of citizenship, and that the scheme of the state statute was not to make him a mere conduit for the taxation or regulation of the person in the position of the United States. Thus, in the *Dravo* and *Curry* cases the exaction was placed solely on the contractor, and any burden resulting to the Government was of a piece with the economic burden of compensating its contractor. Similarly, in the *King & Boozer* case the sales tax statute required the vendor to pass the tax on to the contractor,

and made him liable as the purchaser, but its force was spent at that point. And in the *Penn Dairies* case the Court observed (318 U. S. at p. 270):

> Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. * * * As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk.

In each of these cases the Court looked to what may be called the "legal incidence" of the exaction—to the outermost point which the state statute sought to control. Since the legal thrust of the tax or regulation was held not to reach the Government, the statute was sustained.

Conversely, where the tax has been on the person in the position of the Federal Government here, the state exaction has been held invalid. *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, like the three preceding tax cases, dealt not with an *ad valorem* property tax but with an excise tax—a state sales tax. The tax was collected by the state from the vendor, a lumber company, rather than from the vendee, a federal land bank. The North Dakota statute, however, required the seller to add the tax to the purchase price and made the amount of the tax a debt due from the purchaser to him. It was therefore clear that by force of the state law the

purchaser was made "liable for the sales tax" (314 U. S. at p. 99). On this basis it was held that the state statute could not be validly applied to purchases by a federal land bank, even though the tax was collected from a private person.[26] And see *Maricopa County* v. *Valley Bank* (*supra*, p. 38, footnote 21); *Pacific Coast Dairy* v. *Dep't*, 318 U. S. 285, 295.

In cases otherwise doubtful, the test of who is the real taxpayer, made ultimately liable for payment, would seem in principle to provide a sound approach. Where the real taxpayer is the contractor or other person who deals with the United States, the state is fortified in its contention that the contractor, in common with other private individuals, is merely being required to contribute his share of the cost and burdens of community life. Any reverberations reaching the Government are transmitted by forces other than the exertion of state power, and it is no doubt a sensible view that

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[26] The fact that the bank's immunity was rested on an Act of Congress, exempting it from "State, municipal, and local taxation," rather than upon the Constitution unimplemented by congressional action, is immaterial for present purposes. In other cases, likewise, the Court has recognized (*Colorado Bank* v. *Bedford*, 310 U. S. 41, 52) that—

> The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself.

See *Stahmann* v. *Vidal*, 305 U. S. 61; *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33, 43, 49; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 361–362, 363–364.

in dealing with private persons the Government must take the situation, as to them, as it finds it. If, due to a use of the cost-plus-a-fixed-fee type of contract or some similar device, the reverberations on the Government are more direct than in the normal case, this is still the consequence not of state action but of the Government's election to do business in that manner. Congress, if it chose, could doubtless make express provision for that situation. See *Penn Dairies* v. *Milk Control Comm'n*, 318 U. S. at pp. 271–279; *Alabama* v. *King & Boozer*, 314 U. S. at p. 8; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95. But the considerations are quite different where the real taxpayer is not the contractor but the person in the position of the United States. Any claim that the contractor is merely being called upon to bear his share of the costs and burdens of government lacks foundation, for the contractor is but a conduit for the imposition of the costs and burdens of government upon some one else. Even where the state elects to proceed against the contractor, or even disclaims the right to proceed against the Government or its property, the practical needs for the immunity are apparent. It is still the Government's property which is directly and immediately diverted to state purposes, and it is the Government which is saddled with the problems of compliance.

As we have seen (*supra*, pp. 25–27), the real taxpayer in Pennsylvania is the owner of the prop-

erty, the person in the position of the United States here, although the tax may be collected in the first instance from the record title holder. Under the principle of the recent decisions just reviewed, such a tax is invalid as applied to the Government's property. Moreover, the state law cannot be saved by so applying it as to deny Mesta a remedy of reimbursement because it does business with the United States rather than with a private person (*supra*, pp. 28–31). For this is to impose an ultimate liability upon Mesta, solely because of its dealing with the Government, which is not imposed upon other contractors. The Government, it is true, could neutralize this discrimination by paying the tax, and thus place itself upon an equal footing with other property owners in the state. But the state has no authority under the Constitution to place the Government on an equal footing with other property owners, whether the tax is collected directly or ultimately from it. Hence, the test is whether the state law in normal operation makes the property owner the real taxpayer. Since it does, the tax is invalid, absent congressional consent, where, as here, the Government is the property owner.

The attitude of Congress.—It is clear that Congress, like the states (*supra*, p. 33), has "accommodated its legislation" to the chain of decisions of this Court declaring invalid the assessment of taxes on Government property. It has, in gen-

eral, assumed that absent action on its part the Government's property is immune from state and local taxation. When deeming such action expedient, Congress has by express statute permitted the taxation of some specific property,[27] or has expressly authorized payments in lieu of taxes.[28] The contract with Mesta was authorized under the Act of July 2, 1940, c. 508, 54 Stat. 712. There can be no contention that Congress by this or any other act has waived the immunity of the machinery which is included within the instant assessment.

The understanding of Congress that Government property is immune under the Constitution

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[27] Within the course of only three Congresses (73rd to 75th), Congress waived in 9 Acts the immunity of various federally-owned real estate and personal property. Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128; Act of June 18, 1934, c. 585, 48 Stat. 993; Federal Credit Union Act, c. 750, 48 Stat. 1216; National Housing Act, c. 847, 48 Stat. 1246; Act of March 12, 1936, c. 138, 49 Stat. 1160; Act of April 17, 1937, c. 108, 50 Stat. 68; Act of August 25, 1937, c. 772, 50 Stat. 806; Farm Credit Act of 1933, c. 98, 48 Stat. 256; Bankhead-Jones Farm Tenant Act, c. 517, 50 Stat. 522.

[28] In many instances Congress has authorized the United States or its agencies to pay certain amounts to states or to local taxing units in lieu of taxes. Act of May 18, 1933, c. 32, 48 Stat. 58; Act of April 13, 1934, c. 116, 48 Stat. 576; Act of June 29, 1936, c. 860, 49 Stat. 2025; Act of June 29, 1936, c. 868, 49 Stat. 2035; Second Deficiency Appropriation Act, fiscal year 1937, c. 277, 50 Stat. 263; Bankhead-Jones Farm Tenant Act, c. 517, 50 Stat. 522; Interior Department Appropriation Act, 1938, c. 570, 50 Stat. 564; Act of August 28, 1937, c. 876, 50 Stat. 874; United States Housing Act of 1937, c. 896, 50 Stat. 888.

from state and local taxation, and its unwillingness at least thus far to waive the immunity with respect to property owned directly by the Government and utilized in the war program, are underscored by the history of certain proposed legislation. In July 1942, the Senate adopted a Bill (S. 2308, 77th Cong., 2d Sess.), providing that all real property which had been acquired by the United States since January 1940 for military purposes should remain subject to taxation by the state and political subdivisions where located, in the same manner as privately owned property situated there. The Bill was sent to the House, referred to the Committee on Public Lands on July 6, 1942,[9] and died there. The failure of this Bill is the more significant when its narrow scope is considered. Since June 1940, under the exigencies of the war, large tracts have been condemned for military purposes and it was intended that—

> "The bill would merely relieve the distressed counties and States which heretofore collected taxes from the private owners. The burden would be thrown upon the Government to meet the county and State taxes, so as to enable the counties and States to continue the normal administration of their affairs."[10]

Thus it appears that Congress has refused to place upon the Federal Government the burden of

---

[9] 88 Cong. Record, Part 5, p. 6002.

[10] 88 Cong. Record, Part 5, p. 5923.

taxes on property but recently removed from the local tax rolls. The property here involved is, of course, in an entirely different category. It was never a source of revenue to the State of Pennsylvania or to Allegheny County.[31]

After meeting this fate in the 77th Congress, the Bill was reintroduced in identical or substantially similar form nine times in the 78th Congress, once in the Senate,[32] where it was reported,[33] but not passed, and eight times in the House,[34] where it was always referred to the Committee on Public Lands and not reported back. In addition a bill[35] has been introduced in the 78th Congress to permit taxation of *all* Government-owned property, and another[36] is now pending before the House which excepts only court houses, post offices, customs houses, and the like. Four bills have been introduced in the Senate[37] and five in the House[38] to provide for payments to local taxing units by the United States in lieu of taxes.

---

[31] The record shows (R. 25, 31) that Allegheny County did obtain out of this contract some new property which undoubtedly is and will continue to be subject to taxation, in the form of the building owned by Mesta, which was erected to house the machinery.

[32] S. 249, 1st Sess.

[33] 89 Cong. Record, Part 7, p. 4851.

[34] H. R. 1288, 1305, 1578, 1658, 2246, 2338, 2724, 3166, all 1st Sess.

[35] S. 436, 1st Sess.

[36] H. R. 3359, 1st Sess.

[37] S. 32, 73, 1018, and 1375, all 1st Sess.

[38] H. R. 507, 1392, 2122, 3119, and 3161, all 1st Sess.

Whether any of these measures will become law it is impossible to say. It is to be presumed that they will receive the careful study of appropriate congressional committees, which are able to make independent investigation to discover the particularities of the problem and to fit the relief to the needs.

The problem is one of tremendous complexity, arising from varied conditions, and probably cannot be settled by a general legislative rule. This was a point emphasized by the Federal Real Estate Board [39] in a recent report issued after four years of study of the situation of communities adversely affected by the loss of revenue on land purchased or acquired by the Federal Government.[40] The Federal Real Estate Board believes that a further program of contributions in lieu of taxes would be warranted with respect to some classes of property, including property acquired by the War Department, where there has been a demonstrated loss of revenue to the local taxing unit without compensating benefits (Report, pp. 17–19). It is of the opinion, however, that the Federal Gov-

[39] The Board, created by Executive Order No. 8034 of January 14, 1939, was composed of one representative each of the Departments of Justice, Interior, Agriculture, Commerce, War, and Navy, and of the Bureau of the Budget, the Tennessee Valley Authority, and the Federal Works Agency.

[40] *Report on Federal Contributions to States and Local Governmental Units with Respect to Federally Owned Real Estate*, Washington (1943), published as House Document No. 216, 78th Cong., 1st Sess., pp. 1–4. We hereafter cite this study as "Report."

ernment "should retain its legal exemption from the jurisdiction of State and local tax authorities", pointing to the "grave administrative difficulties," among other considerations, which any contrary policy would present (Report, p. 12). The Board states that "Federal aids to the States far exceed any reasonable estimate of obligations with reseect to real estate ownership" (Report, p. 10). Moreover, even where some local taxing units suffer, "the direct benefits from Federal projects to the State at large or to certain of its local districts may exceed the aggregate tax loss to all" (Report, p. 14). In such situations the states themselves are in a position to aid the political subdivisions adversely affected without the intervention of the Federal Government (Report, pp. 14–15).

The volume of Federal expenditures requires no elaboration and their effect on state finances is indicated by the table which we have included in Appendix B, *infra,* p. 60–61, reflecting the steady and substantial increase in state revenues since the inception of the national defense program. It would seem to be a matter of fair legislative debate whether, or to what extent, the financial burdens of the nation should be further increased by the claims of need on the part of local taxing units.

The scope of the general problem is enormous. In terms of the present controversy, a survey discloses that the United States at the present time owns, in the continental United States, through the War Department, the Navy Department, and the United States Maritime Commission alone, machinery, equipment and buildings located on private lands, under contracts with private corporations similar to the Mesta contract, in a total value of approximately two billions of dollars. Of this, property of a value approximating $257,500,000 is situated within Pennsylvania. In addition, in the continental United States, through these agencies alone, the Government owns entirely, including the land and improvements, facilities valued at nearly 5½ billions of dollars which are operated by private contractors.[41] These facilities might be assessed to the contractor upon the theory of the Pennsylvania court that an assessment is valid if not levied upon or collected

[41]

	Cost of Government owned facilities located on privately owned lands in the United States	Cost of Government owned facilities located on privately owned lands in Pennsylvania	Cost of facilities owned entirely by the United States but operated by private contractors
War Department	$760,000,000	$80,000,000	$4,760,000,000
Navy Department	895,000,000	170,000,000	393,000,000
Maritime Commission	261,500,000	7,500,000	290,500,000
	1,916,500,000	257,500,000	5,443,500,000

The foregoing information has been supplied to us by the War and Navy Departments and the Maritime Commission.

from the United States.[42] The Government and its contractors are now confronted with numerous assessments already entered against Government property in Pennsylvania and elsewhere and, if the present decision is allowed to stand, it seems likely that a substantial portion of the 7½ billion dollar valuation will be taxed.[43]

The character of the problem brings still further support, we believe, to the long line of decisions of the Court sustaining the immunity of Government property from state and local taxation except where Congress has consented. The Federal Government has not been unsympathetic in the past to the financial needs of state and local governments. The question of the relief to be afforded is peculiarly within the competence of the legislative branch of the Government. Congress under the decisions of the Court has long understood that absent action on its part Federal property is immune from state and local taxation. After study of the problem, remedies to meet particular situations have been adopted in the form of legislation.

---

[42] Six such assessments have been made in California and one in Massachusetts.

[43] Between the entry of the present assessment against Mesta and the preparation of this brief, the Department of Justice was advised of 79 assessments in 10 states. These figures include the seven assessments referred to in footnote 42.

In summary, it seems clear in the light of all of the considerations that the Pennsylvania tax as here applied cannot be sustained. It is not a tax upon the contractor's property, nor is it an excise on his business or income. It is an *ad valorem* real property tax unambiguously imposed and measured upon the property of the United States. Every practical reason for the Government's immunity is present, not because of any contract but because it is the Government's property which is involved. At least since *Van Brocklin* v. *State of Tennessee, supra,* it has not been doubted that a tax upon the Government's property is invalid, even when collected from someone else.

Moreover, if it were not enough that the tax is an *ad valorem* tax on the Government's property, a further fact requires reversal of the judgment below. Approaching the problem from the other end of the scale—from the standpoint of the competing interest of the states and their political subdivisions in the maintenance of tax sources and the imposition of equal burdens on all bound to their support—the Court has sustained various excises on the business and income of a person who deals with the Government. These have been valid notwithstanding incidental reverberations transmitted to the Government. But in all of these cases the exaction was on the private per-

son; in none did the exertion of state power reach the person in the position here of the United States. When the contrary was true, the statute as so applied was held invalid. It was not saved because the state proceeded for collection against, or otherwise sought to bring its power to bear upon, the private person. The scheme of the Pennsylvania law is not to tax the contractor for property owned by another, but to tax the real owner. Thus, nothing in the decisions sustaining a tax or regulation, or in the policy underlying them, can support the state tax in its present application. The record titleholder, such as Mesta, is not called upon to pay the tax as a measure of its obligation of support to local government. The tax is on the real owner of the property, and it is his obligation of support which the tax measures.

Nor is the tax saved by the device of failing to give persons who deal with the Government the same remedy of reimbursement against the real owner of the property which is given to all others. On its face, this is a discrimination solely because of dealings with the Government, and a discrimination which can be neutralized only by the Government's paying the tax. This would put the Government on the same level as private property owners within the state, but it is precisely this level to which the Government may not be reduced by state action. The test must be whether the state law, absent any question of immunity, makes the

property owner the real taxpayer. Since it does here, the tax is invalid as applied to the Government's property.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
ALVIN J. ROCKWELL,
PAUL F. MICKEY,
Special Assistants to the Attorney General.
MYRON C. CRAMER,
Major General,
The Judge Advocate General.

JANUARY, 1944.

APPENDIX A

Pennsylvania Act of May 22, 1933, P. L. 853, as amended by the Act of July 2, 1941, P. L. 219:

SECTION 201. Subjects of Taxation Enumerated.—The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate:

(a) All real estate, to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries, and ferries, wharves, and all other real estate not exempt by law from taxation.

* * * * *

(See 72 Purdon's Statutes (1936) 5020-201.)

Act of June 4, 1901, P. L. 364:

SECTION 2. All taxes which may hereafter be lawfully imposed or assessed on any property in this Commonwealth, in the manner and to the extent hereinafter set forth, shall be and they are hereby declared to be a first lien on said property, together with all charges, expenses and fees added thereto for failure to pay promptly; and such liens shall have priority to, and be fully paid and satisfied out of the proceeds of any judicial sale of said property before any other obligation, judgment,

claim, lien or estate with which the said property may become charged, or for which it may become liable, save and except only the costs of the sale and of the writ upon which it is made.

(53 Purdon's Statutes (1936) 2022.)

Act of April 3, 1804, P. L. 517:

SEC. 6. *And be it further enacted by the authority aforesaid,* That every tenant who may or shall occupy or possess any lands or tenements, shall be liable to pay all the taxes which during such occupancy or possession may thereon become due and payable; and having so paid such taxes, or any part thereof, it shall be lawful for him, by action of debt or otherwise, to recover said taxes from his landlord, or, at his election, to defalcate the amount thereof in the payment of the rent due to such landlord, unless such defalcation or recovery would impair any contract or agreement between them previously made.

(72 Purdon's Statutes (1936) 5791.)

APPENDIX B

TOTAL STATE TAX COLLECTIONS, BY STATES: 1939–1943 [1]

[In thousands of dollars]

[Prepared from *State Finances* published by the Bureau of the Census, Governments Division, Department of Commerce]

United States	1939	1940	1941	1942	1943
Total	3,049,672	3,312,644	3,597,193	3,898,812	3,999,793
Alabama	40,764	45,844	51,405	51,043	61,280
Arizona	14,396	18,551	17,989	23,765	24,119
Arkansas	28,130	30,844	33,486	40,879	42,331
California	237,768	258,732	287,597	333,475	355,483
Colorado	31,627	33,798	37,323	38,484	41,640
Connecticut	38,517	44,420	50,474	57,784	55,562
Delaware	9,438	10,603	10,626	10,825	11,492
Florida	49,218	51,937	60,650	59,793	50,111
Georgia	40,601	45,923	50,876	58,793	57,786
Idaho	10,970	11,643	12,858	13,077	13,503
Illinois	186,781	197,495	210,249	230,969	216,569
Indiana	70,445	80,206	85,337	95,701	90,437
Iowa	62,358	63,367	67,134	70,870	66,211
Kansas	26,270	38,011	40,114	44,411	48,391
Kentucky	41,195	43,470	49,299	54,515	49,306
Louisiana	68,949	74,895	76,712	81,130	86,289
Maine	19,141	20,542	21,149	22,961	21,426
Maryland	33,046	44,414	47,047	47,938	49,936
Massachusetts	104,762	121,635	125,066	124,115	133,503
Michigan	132,783	149,597	172,161	183,902	179,214
Minnesota	69,889	78,892	76,752	91,350	93,212
Mississippi	27,389	30,708	33,495	42,379	45,279
Missouri	69,189	72,819	83,211	82,670	84,768
Montana	11,801	11,610	12,077	14,145	13,865
Nebraska	22,761	22,613	22,634	23,660	23,364
Nevada	3,613	3,654	3,878	4,649	4,524
New Hampshire	10,436	12,989	13,072	13,478	11,588
New Jersey	116,862	96,736	95,694	104,719	100,703
New Mexico	14,318	15,678	17,093	18,299	18,716
New York	416,215	432,870	488,234	485,887	460,456
North Carolina	68,111	76,257	86,889	99,018	103,516
North Dakota	9,754	13,853	15,357	18,546	17,814
Ohio	195,853	198,441	227,874	228,494	223,853
Oklahoma	55,853	55,856	56,682	73,537	71,953

[1] Includes sales, use, gross receipts, license, privilege, income, property inheritance, gift, severance, poll, and stock transfer taxes.

United States	1939	1940	1941	1942	1943
Oregon	23, 108	25, 870	28, 825	35, 847	39, 765
Pennsylvania	221, 886	253, 181	272, 889	290, 502	274, 506
Rhode Island	14, 477	15, 864	16, 093	17, 051	20, 854
South Carolina	31, 525	31, 411	35, 914	44, 692	46, 147
South Dakota	16, 099	15, 321	16, 454	14, 839	15, 169
Tennessee	38, 837	43, 349	46, 031	54, 575	51, 455
Texas	107, 959	126, 855	127, 467	137, 574	156, 588
Utah	15, 108	17, 034	18, 307	20, 511	22, 191
Vermont	9, 658	10, 307	10, 806	11, 253	10, 005
Virginia	44, 378	46, 916	57, 267	65, 423	61, 839
Washington	83, 326	60, 487	63, 978	90, 124	94, 511
West Virginia	41, 854	47, 250	51, 268	56, 788	53, 686
Wisconsin	75, 905	83, 236	93, 667	110, 466	117, 312
Wyoming	7, 152	6, 978	7, 602	7, 386	7, 558

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. 417

THE UNITED STATES OF AMERICA AND MESTA MACHINE COMPANY, Appellants,

v.

COUNTY OF ALLEGHENY, PENNSYLVANIA.

Appeal from the Supreme Court of the State of Pennsylvania.

BRIEF FOR MESTA MACHINE COMPANY, ONE OF THE APPELLANTS.

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Appeal from the Supreme Court of the State of Pennsylvania.

BRIEF FOR MESTA MACHINE COMPANY, ONE OF THE APPELLANTS.

Mesta Machine Company, one of the appellants, believes that the issues involved in this appeal have been fully and adequately argued in the brief submitted by United States of America, and that a separate argument would serve no purpose to the Court or to the appellants. Accordingly, Mesta Machine Company adopts as its brief on the merits the brief heretofore filed by the Solicitor General.

ELDER W. MARSHALL,
CARL E. GLOCK,
Solicitors for Mesta Machine Company.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

WALTER P. SMART,
EDWARD G. BOTHWELL,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 417

MESTA MACHINE COMPANY AND THE UNITED STATES OF AMERICA,

Appellants,

vs.

COUNTY OF ALLEGHENY.

APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT, AT NO. 77 MARCH TER., 1943

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now County of Allegheny, appellee, and, under the provisions of Rule 12, par. (3), of the Rules of this Court, makes the following statement disclosing matters and grounds making against the jurisdiction of this Court asserted by appellants, and includes herein its motion to dis-

miss or affirm the judgment sought to be reviewed in this appeal:

(1) The judgment of the Supreme Court of Pennsylvania sought to be reviewed in this appeal is one in affirmance of an assessment, as real estate, of appellant Mesta's mill or manufactory, made by the proper assessing authority under the provisions of a state statute directing such an assessment to be made for local tax purposes. The appealed decision is officially reported: *Mesta Machine Company* case, 347 Pa. 191.

(2) The appealed judgment is merely a decision reaffirming the settled law of the state that the words "mill or manufactory", as used in the statute, include all machinery upon the premises and essential to the operation thereof, irrespective of its ownership by a third party. The decision holds that the fact that the United States is the owner of some of the machinery comprising Mesta's mill is immaterial and that the assessment, as made, falls within and complies with the settled law of the state.

(3) The decision holds that the machinery owned by the United States is not assessed as the property of the United States and that, under the law of the state, the Government's paramount rights therein could not be divested or in any way affected by any default in payment of any tax based upon the affirmed assessment of Mesta's mill or manufactory.

(4) Appellant Mesta neither claims nor possesses, in its own right, any Federal right or immunity under the Constitution of the United States, or otherwise, which is in any wise prejudiced or adversely affected by the appealed judgment.

(5) Appellant United States neither claims nor possesses any Federal right or immunity under the Constitu-

tion of the United States, or otherwise, which is in any way prejudiced or adversely affected by the appealed judgment. The only possible interest of the United States in the case at bar arises *ex contractu* and constitutes, if anything, merely an economic burden voluntarily assumed.

(6) In the factual situation presented, the construction and application of the state statute as made by the appealed judgment, neither involves nor could involve a Federal question, nor does it either affect or purport to affect in any manner whatsoever any Federal right or immunity possessed by either of the appellants severally or by both of them jointly.

WHEREFORE, appellee respectfully moves the Court to dismiss the appeal herein or to affirm the appealed judgment.

COUNTY OF ALLEGHENY,
Appellee,

By WALTER P. SMART,
County Solicitor;
EDWARD G. BOTHWELL,
Assistant County Solicitor,
Attorneys for Appellee.

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BRIEF FOR APPELLEE

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Appeal From The Supreme Court Of The State of Pennsylvania

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

In order to bring into bold relief what appellee believes to be the real questions involved in this appeal, a counter-statement of the case is deemed necessary and advisable. For convenience, appellant The United States of America will be referred to as the Government; appellant Mesta Machine Company, a Pennsylvania corporation, as Mesta; appellee County of Allegheny, Pennsylvania, as the County; and the Commonwealth of Pennsylvania, as the State.

Mesta owns and operates for profit a mill or manufactory in West Homestead, a borough located in Allegheny County, Pennsylvania. A State statute (Act of 1933, P. L. 853, § 201, as amended by Act of 1941, P. L. 219; 72 PS § 5020-201; Appendix A to the brief for the

Government, p. 58), requires "the following subjects and property" to "be valued and assessed, and subject to taxation for all county, * * * *, borough, * * * * school, and poor purposes at the annual rate: (a) All real estate, to-wit: * * * *, mills and manufactories of all kinds, * * * *". This statute was derived from the Act of 1927, P. L. 491, (72 PS § 4781), which was derived from the Act of 1844, P. L. 486, (72 PS § 4781), which was derived from the Act of 1834, P. L. 509, (72 PS § 5071). (See the "Historical Note" immediately following each of the foregoing citations to Purdon's Statutes). The statute and its predecessors have thus been the continuous statutory law of the State for over a century.

By the settled decisional law of the State in construction of the statute, a "mill" or a "manufactory" is *an entity* comprised of the land, the buildings, and all machinery upon the premises and essential to its operation as a mill or manufactory. And by the settled decisional law of the State, a mill or manufactory is assessed in the name of and against the record owner of the land upon which it exists, without regard to contractual rights or obligations between such record owner and any third party concerning the entity or any of its constituent parts. (See the opinion of the Court below (R. 97-99) for a factual statement of the State law in both of these two respects).

In 1942, the proper assessing authority assessed Mesta's mill against Mesta, as required by the statute and the decisional law of the State, at a value of $3,901,504 (R. 36). This assessment included machinery upon the premises and essential to the operation of the mill, to the value of $2,489,085 (R. 35). Mesta thereupon

appealed to the Court of Common Pleas of Allegheny County from that assessment, upon the ground that $618,000 in value of the machinery included in the assessment of the mill belonged to the Government and was immune from the assessment of its mill. Upon a petition showing, *inter alia*, that it had contractually agreed to reimburse Mesta for "any applicable State or local taxes, fees, or charges which the Contractor [Mesta] may be required on account of this contract [a contract which will be hereinafter described] to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel" (R. 43), the Government was granted leave to intervene in said appeal (R. 9-14)..

At the hearing of said appeal, the trial court, over objection by the County as to its materiality to the issue, admitted in evidence the above mentioned contract (R. 38-64) dated October 30, 1940, and a supplement thereto (R. 65-69), dated February 21, 1941, between the Government and Mesta, the primary purpose of which was the manufacture of a quantity of guns by Mesta for the Government at a fixed price per gun, subject to future adjustments for changes in labor costs only.

To facilitate the manufacture of the guns, Title I of the contract and its supplement required Mesta, "as an independent contractor and not as an agent of the Government" (R. 41), (1) to purchase in the open market, and install in its mill, certain machinery, tools, and equipment, (2) to manufacture in its own mill, and install therein, certain other machinery, and (3) to rebuild or readapt, and install in its mill, certain machinery owned by the Government and to be furnished by it. All of this machinery was eventually installed in Mesta's mill, and it was the inclusion of this machinery (valued

at said total amount of $618,000) in the assessment of the mill to which Mesta and the Government objected. Tabulated according to the three categories just mentioned, the values of the machinery as included in the assessment were as follows:

(1) Purchased by Mesta	–	$444,000 (R. 26, 36-37)
(2) Manufactured by Mesta	–	14,000 (R. 28, 36-37)
(3) Furnished by the Government	–	160,000 (R. 31, 36-37)
Total	–	$618,000

Article I-H of the contract (R. 46) provided in substantial effect that title to all of the said machinery should vest in the Government upon its inspection and acceptance thereof, but it also provided that "these provisions as to title being vested in the Government shall not operate to relieve the Contractor [Mesta] from any duties imposed under the terms of this contract". One of the duties imposed upon Mesta by the contract was the following (R. 45-46): "The Contractor hereby agrees that it will: (a) * * * * (b) * * * *; obey and abide by all applicable laws * * * * of the State * * * * wherein the work [of purchase, manufacture, rebuilding, and installation of said machinery] is done, or of any other duly constituted public authority."

By Title II of the contract (R. 49-50), the Government then proceeded to lease, or bail, all of said machinery to Mesta, whose liability with respect thereto was contractually fixed as that "of a bailee under a mutual benefit bailment" (R. 50). Mesta's use thereof was contractually limited to the manufacture of the guns in performance of the primary purpose of the contract, "except that the Contractor [Mesta] may use for

general purposes such machinery and equipment as is purchased or furnished to supplement its existing facilities" (R. 49). By Article II-E (R. 50), the contract required Mesta to remove all of the machinery from its premises upon termination of the provisions of the contract relating to the manufacture of the guns and to ship it as might be designated by the Government, unless a further contract to maintain it "in a stand-by condition" should subsequently be entered into between the Government and Mesta.

The trial court sustained the appeal. It reduced the assessment of Mesta's mill by the sum of $618,000, the value of the machinery involved. The opinion of the trial court is reported as *Appeal of Mesta Machine Co.*, 91 Pittsburgh Legal Journal 343, and is printed in the Record (R. 79-89).

Upon appeal by the County to the Supreme Court of Pennsylvania, the Court below, the decision of the trial court was reversed and the assessment of $3,901,504 of Mesta's mill for the year 1942 was restored and affirmed, at the cost of Mesta. The opinion (and judgment) of the Court below is officially reported as *Mesta Machine Company Case*, 347 Pa. State Reports 191, and is printed in the Record (R. 95-102). A dissenting opinion concurred in by two of the seven justices was filed (R. 102-110). A joint motion by Mesta and the Government for reargument (R. 115-122) was refused (see official report, 347 Pa. 191, 192).

The decision of the Court below (R. 95-102) reaffirmed the settled decisional law of the State hereinbefore mentioned. It held the Government's contractual title to the machinery involved to be immaterial and the assessment to have been made within, and in compliance

with, the settled law of the State. It held that the machinery to which the Government claimed title was not assessed as the property of the Government but "as the property of the Mesta Company" (R. 100). It held that "under the circumstances, [the assessing authority] was justified in treating the ground, building, and machinery [upon the premises] as an entity, a mill, or manufactory, and assessing it as such to the Mesta Company, the registered owner of the land" (R. 99). It held that "if the Mesta Company defaults in the payment of [any tax levied in consequence of the assessment made against it], the paramount rights of the government in the machinery [involved in Mesta's appeal from the assessment] could not be divested or in any way affected" (R. 100), thus establishing for any future eventuality the "law of the case" in such manner as to make applicable, should the occasion for its application ever arise, the ruling of this Court in *New Brunswick vs. United States,* 276 U.S. 547, to which, in so holding, the Court below specifically referred (R. 100). And it held, further, that "the legal obligation to pay was on the company and not on the government" (R. 100), and that "the government's status, as far as the [bailed] machinery is concerned, is precisely the same throughout, and it cannot [under the law of this State] suffer any loss by reason of the assessment of its machinery as part of the Mesta mill" (R. 100).

The Government and Mesta petitioned the Court below to be allowed to appeal its decision and judgment to this Court (R. 124). Their petition was allowed (R. 125-6), and their appeal (in joint form) was filed in this Court on Oct. 8, 1943. Under the provisions of Rule 12, par. (3), of the rules of this Court, the County filed

its statement opposing jurisdiction and motion to dismiss or affirm. The County's said statement and motion is based upon (a) the nature of the decision and judgment sought to be reviewed, as above outlined, (b) the absence of any Federal right or immunity under the Constitution of the United States, or otherwise, in either Mesta in its own right or in the Government, which is in any wise prejudiced or adversely affected by the appealed judgment, and (c) the comprehensive point that "in the factual situation presented, the construction and application of the State statute, as made by the appealed judgment, neither involves or could involve a Federal question, nor does it either affect or purport to affect in any manner whatsoever any Federal right or immunity possessed by either of the appellants severally or by both of them jointly." By an order entered herein on Oct. 25, 1943, this Court postponed further consideration of the question of its jurisdiction until the hearing of this case on the merits.

The factual situation may be thus summarized: By contract, the Government is a bailor of certain machinery installed by its bailee as an integral part of the bailee's mill for use by the bailee in the manufacture, for the bailee's profit, of guns for the Government and for other general purposes. The Government's bailee is the record owner of the land upon which its mill exists. The contract of bailment requires the bailee to obey and abide by the applicable laws of the State in which its mill is located and provides that the title of the Government as bailor shall not operate to relieve the bailee from performance of said duty. The contract of bailment requires the Government to reimburse the bailee for any applicable State or local taxes that the bailee

may be required, on account of the contract, to pay on or for its plant. The State court of last resort affirmed a statutory assessment against the bailee of the bailee's mill, for local tax purposes, as having been made in conformity with the settled law of the State, which requires every mill within the State to be assessed (as a single entity comprising all lands, buildings, and machinery upon the premises and essential to its operation as a mill) against the record owner of the land upon which the mill exists, irrespective of any contractual relations between such record owner and any third party concerning the title to any constituent part thereof. In so affirming said assessment, the State court of last resort held that, under the law of the State, the Government's title to the bailed machinery could not be divested or in any way affected by any failure of the bailee to pay any tax resulting from the assessment, that the legal obligation of the tax is on the bailee and not on the Government, and that the Government cannot suffer any loss by reason of the assessment.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

(1) Does the State law, as construed and applied by the appealed decision, impose an unconstitutional burden upon the Government?

(2) Does this Court have jurisdiction to review the decision of the State court in this appeal by the Government and its bailee?

SUMMARY OF ARGUMENT TO FOLLOW

As to the merits. If the Court takes jurisdiction, the question is whether the State law, as construed and applied by the appealed decision, imposes an unconstitutional burden upon the Government by a judicially discernible interference with its functioning. The Government's contractual assumption of the increase in tax due to the bailment is merely an economic burden voluntarily assumed and has no bearing upon the question. The Government's argument as to the nature and effect of the affirmed assessment is based upon false premises of fact. When viewed in the light of the actual facts, the case does not involve the assessment of any property of the United States whatsoever. The thing assessed is Mesta's mill as a single entity. All property rights of the Government in the bailed machinery remain untouched by the assessment. The legal incidence of the resultant tax is solely upon Mesta's land and upon Mesta personally as the person solely and ultimately liable, with no legal right of subrogation in Mesta against the Government (or against any other bailor in like position). The assessment and tax are non-discriminatory as to both the Government and Mesta. Apart from its contractually assumed liability, the Government suffers no burden whatsoever by the affirmed assessment. The State law, as construed and applied, effects no judicially discernible interference with the functioning of the Government. As on its merits, the appealed judgment should be affirmed.

As to the jurisdiction. No Federal right is actually involved in the appealed decision. Decision of the Federal question presented (*i. e.*, the immunity from State

taxation of property of the United States) is not necessary to a determination of the cause. It was not decided below. Its decision was not necessary to the appealed judgment as rendered. The decision below was based upon a determination, under State law, that the subject matter of the assessment was not the property as to which the claim of immunity was made. It was made upon grounds having no relation to any Federal question. In such case, the decision of a State court is not reviewable. No Federal right of either the Government or Mesta is adversely affected or prejudiced by the appealed decision. Consequently, this Court is without jurisdiction either by appeal or by petition for certiorari.

Conclusion. This appeal is just an ill-disguised effort by the Government to escape from an improvidently made bargain. All other interests of the Government are fully protected by the appealed decision. The judgment below is just and equitable. It should be affirmed, or the appeal (whether considered as an appeal or as a petition for certiorari) should be dismissed for want of jurisdiction.

ARGUMENT

I.

The State law, as construed and applied by appealed decision, imposes no unconstitutional burden upon the Government.

(1). The Government admits that its contractual obligation to reimburse Mesta for the increase in local taxes resulting from the increase in the assessment of its mill, due to the installation of the bailed machinery, is an economic burden voluntarily assumed and constitutes no grounds for assertion of an unconstitutional burden: *Alabama vs. King & Boozer,* 314 U.S. 1, 9, and other similar decisions. Hence, that factual element of the present case has no bearing upon the question under argument.

(2). The relevant doctrine now being applied by this Court upon the question under argument finds expression in numerous recent cases. With elision of immaterial matter, citations, and internal quotation marks, we quote from a few of them, as follows:

(a) "As neither government may destroy the other nor curtail in any substantial manner the exercise of its powers, * * * * the limitation upon the taxing power of each, so far as its effects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax * * * * or the appropriate ex-

ercise of the functions of the government affected by it": *James vs. Dravo*, 302 U.S. 134, 156-7.

(b) "In numerous decisions we have had occasion to declare the competing principle, buttressed by the most cogent considerations, that the power to tax should not be crippled by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality and there is only remote, if any, influence upon the exercise of the functions of government. * * * * Immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects. And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits [or his property] on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the government is other than indirect and remote": *Helvering vs. Producers Corp.*, 303 U.S. 376, 385-7.

(c) "Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations": *Graves vs. O'Keefe*, 306

U.S. 466, 488. (In the same case, at p. 483, referring to *Helvering vs. Gerhardt,* 304 U.S. 405, this Court said: "It was there pointed out that the implied immunity of one government and its agencies [*a priori,* its contractors] from taxation by the other should, as a principle of constitutional construction, be narrowly restricted").

(d) "The trend of our decisions is not to extend governmental immunity from state taxation * * * * beyond the national government itself and governmental functions performed by its officers and agents". (The Court had previously said on p. 269 of the case now under quotation that "those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions"). "We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes * * * * and that state * * * * taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders": *Penn Dairies vs. Milk Commission,* 318 U.S. 261, 270-1.

From the language of these cases, we submit that the applicable criterion may be thus stated: Constitutional immunity from State taxation must result from a consideration of the "nature and effect" of the alleged burden. There is no basis for any implication where the "burden" is unsubstantial and undiscernible. To be substantial and discernible, the "burden" must constitute an "interference" with the functioning of the

Government,—not an imaginary "interference" but one that actually interferes.

(3). In the light of the actual facts in this case, what is the true "nature and effect" of the State law?

The brief for the Government proceeds upon false premises of fact. But facts are stubborn things. They do not yield to argument that fails to take proper account of them. The false premises of the Government's argument will be shown:

(a) The subject matter of the statutory assessment is not "machinery". It is "mills and manufactories". "While the property [*i.e.*, the mill] might have been valued in one item, the integrity of the assessment [of the mill] was not affected by the fact that the assessor enumerated the elements entering into the aggregate of the valuation and placed a separate value on each": *Guthrie vs. Pittsburg Dry Goods Co.*, 47 Pa. Superior Ct. 384, 400, (a case cited by the Court below in discussing the settled law of the State,—R. 98). The Government thus begins with clear factual error when it treats the bailed machinery "as a separate, taxable item" (footnote 8, page 23 of its brief). It is not. The thing assessed and taxed is the *"mill"* as a single entity.

(b) The Pennsylvania concept of a "mill" as constituting a single assessable entity necessarily requires that some *one person* be selected by the law as its taxable owner. With sound practical reason, the State law goes straight to *terra firma* and selects the record owner of the land as the owner of the entity. Since Mesta is that person in

the instant case, the owner of the thing assessed and taxed here is Mesta and not the Government. By settled State law, then, this is the fact of the case,—a fact which the Government's argument attempts to avoid but which may not be avoided.

Reference to Exhibits A and B (R. 35-36) and the testimony concerning them (by witness Sexton, R. 16-17, and by witness Cosgrove, R. 18-19) shows clearly the manner in which the assessments of Mesta's mill (including land, buildings, and installed machinery) were made for the years 1941 and 1942, in compliance with the requirements of the settled State law. For the purpose of comparison, these two assessments may be graphically shown thus:

	1941 Assessment	1942 Assessment	
Land	$ 274,855	$ 293,795	
Buildings	761,150	1,118,624	after allowance of exoneration of $4,500
Machinery	1,519,585	2,489,085	
Total	$2,555,590	$3,901,504	

The increase in the 1942 assessment over the 1941 assessment was due to the fact (testimony of witness Cosgrove, bottom R. 18) that "the Mesta Company in 1941 acquired some new land, built additional buildings, and also installed new machinery." The *fact* then is that the 1942 assessment of Mesta's mill was made pursuant to settled State law, as held by the Court below (R. 99). Ac-

cordingly, when the Government, in footnote 8 on p. 23 of its brief, states that the 1942 assessment "was not made on the theory that the Government's [bailed] machinery merely enhanced the value of the land and buildings concededly owned by Mesta", the Government is not stating a fact. The *fact* is that the 1942 assessment *was made,* as required by State law, upon the theory that the value of Mesta's mill was enhanced over its value in 1941 by the value of the newly acquired land, the additional buildings, and the newly installed machinery, including the Government's bailed machinery. (It was entirely proper that the value placed upon the bailed machinery for the purpose of the assessment was its full value: *New Brunswick vs. United States,* 276 U. S. 547).

(c) Now, what are the *facts* concerning the machinery to whose inclusion in the assessment the Government and Mesta object? Passing over the legal magic by which machinery purchased or manufactured by Mesta, as an independent contractor and not as an agent of the Government, could, in the possession of Mesta, contractually become the property of the Government, as against third parties, by the mere process of "inspection and acceptance" (as to that purchased) or by merely being "completed or in the course of construction" (as to that manufactured),—the *fact* is that the contract required Mesta to obey and abide by the applicable law of Pennsylvania and specifically provided that the Government's "title" should not operate to relieve Mesta from performance of that duty. Now, if the law of Pennsylvania is such as to require in-

clusion in the assessment of Mesta's mill of *all machinery* upon the premises essential to its operation as a mill (as is the fact), does it not follow that, by this specific agreement between the contracting parties, the Government's peculiarly acquired "title" to the machinery purchased and manufactured by Mesta was expressly eliminated as grounds for the immunity from inclusion in the assessment of Mesta's mill which the Government and Mesta now claim? What other possible effect could the parties have intended? The *fact* then is that both Mesta and the Government expressly subordinated the Government's "title" to that machinery to the operation of the settled State law.

(d) Now, moving on to the contract of bailment by which the Government bailed to Mesta not only the machinery purchased and manufactured by it but also the Government's own Watervliet Arsenal machinery, what are the *facts* as concerns property rights in consequence of this bailment? Is it not elementary law that, as bailee of all of this machinery, Mesta is possessed of a property right in the subject matter that is equivalent to full proprietorship or actual ownership as to all the world except the Government, the bailor? By what token, then, does the Government assert the fact in this case to be that, for the purpose of this assessment and tax, the Government "owns" this bailed machinery and thus contradict the holding of the Court below that it was included in the assessment "as the property of Mesta" and not as the property of the Government?

Reference to what the Government calls a "finding" by the trial court (page 11 of its brief) that the machinery was "owned by the United States" does not help it. Neither that court nor any other court can alter the *actual facts*. Nor does the Government's reference to what it calls a recognition by the Court below that the United States "owned" the machinery and that "legal title to it" was "actually in the Federal Government" (page 13 of its brief) affect the *actual facts*. Obviously, the "legal title" actually in the Federal Government was merely the title of a bailor. And even that "title", as concerns the machinery purchased and manufactured, was held, by contractual agreement effective upon its original acquisition, in subordination to the law of Pennsylvania, as shown in (c) above.

(e) The Government closes its eyes to the fact that, under settled State law, any contractual relations between a mill-owner and any third party, as concerns machinery installed in the mill and essential to its operation as a mill, are immaterial to the assessment of the mill. That is a matter with which, under settled State law, the assessor is not concerned (R. 99). The State law in this respect results from the provision of the Constitution of Pennsylvania, Art. IX, Sect. 1, which requires that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax": *Bemis v. Shipe*, 26 Pa. Superior Ct. 42, 45, a case cited in the appealed decision (R. 98) in exposition of State law.

(f) The Government states the fact to be that the Court below failed to rule as to whether, apart from Mesta's contractual right, the State law gives Mesta a legal right of reimbursement against the Government. That is not a fact. The Court below stated in the appealed decision itself that "the legal obligation [is] on Mesta and not on the Government" (R. 100) and that the Government "cannot suffer any loss by reason of [the inclusion in] the assessment of [the value of] its [bailed] machinery as part of the Mesta mill" (R. 100). In its motion for re-argument, the Government pressed the contentions that "the law itself subrogates Mesta Machine Company to the position of the taxing body for the purposes of collecting the tax" (R. 117), that "the effect is to impose a tax upon the United States" (R. 117), and that the decision of the Court was arrived at "by ignoring the liability of the Government to pay the tax irrespective of contract" (R. 120). The refusal of re-argument in the face of these contentions is sufficient proof of the intention of the Court below as expressed in its decision and settles against the Government any contention here that, under the law of the State, the so-called "legal incidence" of the tax is upon the Government.

(g) The Government then assumes the fact to be that, under Pennsylvania law, when a mill is assessed and taxed as an entity, including bailed machinery upon the premises, (as it must be), the mill-owning taxpayer (*i.e.* the record owner of the land upon which the mill exists) has an action over against the bailor of the machinery for contribution of a proportionate amount of the tax against the

mill computed upon the ratio of the value of the bailed machinery included in the assessment to the assessed value of the mill. This is certainly strange "law" to a Pennsylvania lawyer. Does the Government expect this Court to swallow that statement of Pennsylvania law upon the Government's bare assertion of it, without the slightest supporting authority either in the appealed decision or in any other Pennsylvania decision? Appellee simply denies the assumed fact and confidently challenges the Government to prove it.

The statement itself shows that the Government has a completely erroneous factual conception of the settled law of Pennsylvania as re-affirmed in the appealed decision. The thing assessed is the mill. It is assessed against the record owner of the *land*. It is the *land* that is charged with the lien of a tax levied upon the assessment. (If the Pennsylvania "tax lien" Act of 1901, P. L. 364, 53 PS §2022, cited by the Government at p. 24 of its brief and printed in Appendix A thereto at p. 58, has any application whatsoever to bailed machinery in a mill, surely the exhaustive research evidenced by the brief for the Government would have discovered some supporting authority for such a proposition. None is cited. We know of none. The implication of the appealed decision itself is expressly to the contrary).

The indivisible nature of the assessment of a mill and of the resultant tax provides a solid basis for subrogation against the real owner of the *land* as the real owner of the *mill*. But the same indivisible nature of the tax obviously destroys any pos-

sibility of any such a *pro tanto* subrogation against the bailor of machinery installed in the mill as the Government imagines. The respective rights and duties of bailor and bailee are fixed by their contract of bailment. These rights and duties *inter sese* are not affected by the assessment and tax of the mill. (The Pennsylvania "landlord and tenant" Act of 1804, P. L. 517, cited at p. 26 of the Government's brief and printed at p. 59, has no possible application to the point). If the Government's notion were supportable either in law or in reason, why was it not advanced in the motion for re-argument below so as to obtain a decision upon it? It is obviously just an "afterthought" presented here. But this Court neither makes State law nor will assume that State law, when made, will be unconstitutionally discriminatory.

In the light of these *actual facts*, it becomes plainly apparent that the true "nature and effect" of the State law is not as contended by the brief for the Government. By its true "nature and effect", there is no tax levied upon any property of the United States. It imposes no legal obligation upon the United States (or upon any "person in the position of the United States", as the Government phrases its point). There is no warrant for the mere assertion that the law of the State gives "a remedy of reimbursement" to a taxpaying mill-owner for recovery against his bailor of the increase in the tax attributable to the installation of bailed machinery in his mill. Consequently, the true "nature and effect" of the State law touches neither the Government nor Mesta as regards any Federal right of immunity of property from taxation. Nor does it discriminate in any way against either Mesta or the Government.

The Government's strong reliance upon the principle of *Van Brocklin vs. Tennessee,* 117 U. S. 151, is misplaced. It is not applicable to the circumstances here. The *Van Brocklin* case was an attempted enforcement of a lien upon property the whole title to all property rights in which was in the United States when the lien, resulting from a direct tax attempted to be imposed upon it, was claimed to have attached. The case at bar is easily distinguishable. Here, the United States is not possessed of all property rights in the machinery involved but is possessed merely of the property rights of a bailor. Here, the subject matter of the challenged assessment is not even the property rights of the United States in the bailed machinery but, as held below, is the bailee's mill as a single entity which includes the bailed machinery "as the property of the Mesta Company", the bailee, (R. 100). Here the property rights of the United States in the machinery, by the appealed decision itself, are not subject to any lien of any tax resulting from the assessment made. Here, those rights, under the law of the State as declared in the appealed decision itself, can never be divested or in any way affected at any future time in consequence of the assessment made or any tax levy based thereon. In the hands of any subsequent owner of this machinery, by transfer to him by the Government of its title thereto, the machinery will stand free and clear of any charge resulting from the assessment made and any tax levied in consequence of it. And it will do so by force of the appealed decision in this case itself. Clearly, the principle of the *Van Brocklin* case has no possible application here.

What has been just argued as to the *Van Brocklin* case effectually disposes of all other similar cases cited

by the Government except *United States vs. Rickert*, 188 U. S. 432, which requires special consideration but is, likewise, clearly distinguishable from the case at bar. In the *Rickert* case, referring to personal property that had been assessed and taxed under a State law, this Court said: "It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the Government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose", because, as this Court had previously said in the same opinion, "To say that these lands [which were likewise assessed and taxed,—the Indians being wards of the Government and possessors of the lands as prospectively ultimate grantees from the United States] may be assessed and taxed by the County of Roberts under the authority of the State, is to say that they may be sold for taxes." In that case, the Government had a paternal interest in its Indian wards into whose hands it had placed the personal property to which this Court referred. It thus was not dealing at arm's length there with the possessors of its property. Here, in the case at bar, the machinery is the subject matter of a contract of bailment made by the Government with an independent contractor for the latter's profit,—a distinction with a very decided difference. Furthermore, in the *Rickert* case, the law of the State was such as permitted the sale of the assessed and taxed property for recovery of the taxes, whereas here, in the case at bar, the law of the State as declared in the appealed decision itself, is directly to the contrary. Hence, the case here is certainly not the *Rickert* case.

(4). Because of the true "nature and effect" of the State law, the whole of the Government's argument (including that under Part II, pp. 31 to 57, of its brief) is totally ineffective in support of any contention that the appealed decision imposes an "unconstitutional burden" upon the United States.

A "test" for a tax is proposed by the Government's argument in a variety of ways. For example, on p. 44, it is referred to as the "legal incidence" or the "legal thrust" of the tax exaction,—is it upon the Government? Again, on p. 45, it is stated as one of "who is the real taxpayer, made ultimately liable for payment" by the challenged State law. Let the Government's own "test" be applied to the actual facts in the case. The result is that this is not a case of tax upon Government property sought to be validated by its collectibility from Mesta, as argued by the Government. It is a case of tax upon the property of the Government's contractor, Mesta, and whose "legal incidence" or "legal thrust" is solely upon Mesta's land and upon Mesta personally as the real taxpayer ultimately and solely liable. Consequently, the case meets the "test" proposed by the Government.

(5). The argument for the Government tries to avoid as much as possible the important fact in this case that the machinery here involved was bailed by the Government into the hands of Mesta *for Mesta's profit.* Even if the bailed machinery itself were the actual subject matter of the State assessment for tax purposes, it would seem that such an assessment and resultant tax should be upheld.

The case then would be "the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account", the

case supposed and inferentially approved in *Clallam County vs. United States,* 263 U.S. 341, 345, where the Court distinguished such a case from the "governmental agency" case there before it.

Contrary to the statement on p. 27 of the brief for the Government that Pennsylvania law does not permit taxation of property owned by a subdivision of the State "in circumstances analogous to those here", the true fact is that Pennsylvania law *does* permit such taxation. In *Pittsburgh School District vs. Allegheny County,* 347 Pa. 101, (decided April 19, 1943, re-argument refused May 10, 1943,—both prior to the appealed decision here), the Court distinguished the cases cited by the Government and held that land leased out by a school district for a commercial enterprise was taxable. And in *Kittanning Borough vs. Armstrong County,* 347 Pa. 108, (decided the same day), the Court applied the same rule to borough owned property rented out for commercial use.

New Brunswick vs. United States, 276 U.S. 547, holds that State asssessment and taxation of property which the Government places in possession of another is permissible so long as the Government's interest in the property is protected from sale for collection of the tax. When, in recognition of that holding, the State law is declared (as it is in this case) to be such as prevents any divestiture of the property rights of the Government in the bailed machinery, any possible objection to a direct assessment of it against the bailee is automatically eliminated. The "legal incidence" of a tax levied upon such an assessment would then be upon Mesta's property rights as bailee and upon Mesta as the person solely liable. Certainly, this is the clear implication of the appealed decision.

But, as hereinbefore shown, the actual subject matter of the assessment here is Mesta's mill and not the bailed machinery. Hence, the argument just made in this sub-section is merely academic and not strictly in point. It would be applicable, however, if the bailed machinery were the thing assessed and taxed, as assumed by the argument for the Government.

(6). Returning now to the language of this Court quoted in (2) above and the applicable criterion believed to be established by this Court for determination of the question under argument, the real and pertinent inquiry is whether there is a judicially discernible "interference" with the functioning of the Government in the State law as construed and applied in this case. The quoted language of this Court itself supplies the answer. It need not be repeated. The plain fact of the case is that it presents no "interference" whatsoever with the functioning of the Government, either direct or indirect. There is no such thing as a Governmental "right" to impose a contract upon any private person. Nor is there any such thing as a "duty" upon any individual to enter into a contract with the Government. If, in consequence of the Government contractor's performance of the contract into which both parties have voluntarily entered, a duty of compliance with State law imposing an increased tax upon his property falls solely upon the contractor and his property, that fact constitutes no "interference" with the functioning of the Government. Obviously, any hesitancy upon the part of the contractor to enter into such a contract (as weakly suggested on p. 40 of the brief for the Government) has no bearing upon the matter, for the same factor would be present in his negotiation of a similar contract with any one.

In no uncertain terms, this Court has but lately announced a steadfast purpose to maintain the relevant doctrine applicable to the case at bar. "Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. * * * * The trend of these cases should not now be reversed": *Oklahoma Tax Commission vs. United States,* 319 U.S. 598, 610.

As upon its merits, the appealed judgment should accordingly be affirmed.

II.

This Court has no jurisdiction to review the appealed judgment and decision.

(1). It is of course true that, where a Federal right is concerned, this Court is not bound by the characterization given to a state tax by a state court or relieved from the duty of considering the real nature of the tax and its effect upon the federal right asserted: *Carpenter vs. Shaw,* 280 U.S. 363, 367. But unless a Federal right is actually involved in the appealed decision, the state court's application of local laws is not subject to review by this Court: *Campbell vs. Olney,* 262 U.S. 352, 354, and cases cited.

(2). "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must

affirmatively appear from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it": *Lynch vs. New York,* 293 U.S. 52, 54, and numerous cases there cited.

(3). Where an immunity of certain property from taxation under the Constitution is claimed and there can be no pretense that the state court, in construing and applying the state statutes in such a way as to uphold the tax, adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds having no relation to any federal question, this Court accepts the decision and will not review it: *Nickel vs. Cole,* 256 U.S. 222.

(4). Where the action of an assessor under a state statute is held by the state court, in construing both the statute and the assessor's action, to have been one in assessment of property properly subject thereto, and not property whose taxation would violate the Constitution (commerce clause),—the decision of the state court, in the respect stated, is not reviewable by this Court: *Wells, Fargo & Co. vs. Nevada,* 248 U.S. 165.

(5). Where a claim of a Federal right involved a question of construction of a state statute prohibiting taxation of property of the United States, and the state

court holds that the thing assessed was not the property of the United States, the construction of the state statute and the conformity to it of the proceedings of the taxing officials were questions exclusively for the Supreme Court of the State, and this Court has no authority to review its determination of them: *Elder vs. Wood*, 208 U.S. 226, 231-2.

(6). It is both fundamental and elementary, of course, that this Court will not entertain an appeal by one who has suffered no injury by the force and effect of the decision attempted to be appealed. An appellant from a State court decision must himself be prejudiced or adversely affected, by the appealed decision, as to a Federal right or immunity possessed by himself or derived from another who is so possessed. More pointedly, in order to give this Court jurisdiction to review the action of a State court sustaining a State statute charged to be unconstitutional, as construed and applied, the question must be raised in this Court by one adversely affected by the decision: *Braxton vs. West Virginia*, 208 U.S. 192.

(7). Coming now to the appealed decision at bar, appellee contends that, once its full import is clearly understood, the principles above stated make it unreviewable by this Court in the pending appeal. The official syllabus of the official report of the decision shows the absence of any ruling upon any Federal question except one pertaining to the due process clause of the Fourteenth Amendment, a question which is in no wise involved in this appeal. What the Court below actually did in its decision was to dispose of the claim

of immunity in such a way, under State law, as to void the case of any Federal question concerning it. And, while doing so, it declared the State law to be such as to prevent any possible injury to the United States in consequence of its decision. In other words, without any pretense of adoption of its view in order to evade a constitutional issue, the Court below, by construction and application of the State law itself to the circumstances, decided the case before it in such a way as to eliminate any claim of constitutional violation and did so without harm to the Government. Consequently, the appealed decision is not reviewable here at the instance of the Government.

(8). So far as Mesta is concerned, it has no constitutional immunity in its own right. Any complaint by it must be derivatively as through the Government. Since the appealed decision is not reviewable here at the instance of the Government, it is not reviewable at the instance of Mesta.

(9). For the above reasons, all of which are substantially set forth in appellee's separately printed "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm" and are covered in appellee's Counter-Statement of the Case, *supra*, appellee respectfully contends this Court to be without jurisdiction in this appeal, whether it be treated as an appeal or as a petition for certiorari.

III.

Conclusion

This appeal is just an ill-disguised effort by the Government to escape from an improvidently made bargain. All other interests of the Government are fully protected by the appealed decision.

The judgment below is just and equitable. It should be affirmed, or the appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 417

THE UNITED STATES OF AMERICA AND MESTA MACHINE COMPANY, *Appellants*,

vs.

COUNTY OF ALLEGHENY, PENNSYLVANIA

BRIEF IN BEHALF OF THE MEMBER CITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICI CURIAE

Appeal from the Supreme Court of the State of Pennsylvania

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SUMMARY OF ARGUMENT

The fundamental weakness of the Government's case is its reliance upon title which it does not have. The Government claims ownership of certain machinery in the Mesta mill; actually title to this machinery is in the Mesta Machine Company and not the Government.

The Government's claim of ownership rests solely upon a provision in its contract with Mesta, an independent contractor engaged in manufacturing field guns for the Government on a cost-plus-fixed-fee basis. The contract provides that title to the machinery acquired by Mesta in connection with the performance of the Government's contract shall be vested in the Government upon its acceptance at the Mesta plant by the contracting officer for the Government. The contract provides for the "leasing" of this machinery to Mesta for one dollar for the term of the contract.

The sleight-of-mind operation by which title to the machinery which was in Mesta was divested and transferred to the Government without change of possession or control and the same machinery "leased" to Mesta, did not vest title in the Government as against third persons.

With the exception of some obsolete lathes delivered from the Government arsenal, none of the machinery was ever in the possession of the Government. Mesta ordered it, installed it, paid for it, marked it with its own serial numbers,—the Government reimbursed it for the cost. Title to the machinery thus acquired by Mesta was clearly vested in Mesta. The agreement between Mesta and the Government with respect to the title to the machinery, while binding as between the parties, was ineffective as to third persons.

Under Pennsylvania decisions, a transfer of title to personal property unaccompanied by change of possession or control is wholly invalid as to third persons. The "acceptance" of the machinery by the contracting officer for the

Government at the Mesta plant, without charge of possession, did not constitute the exercise of such control as meets the requirement of established Pennsylvania law for the transfer of title to personal property, valid as against third persons.

The Pennsylvania assessment statute provides for the assessment of all real estate, including mills and manufactories, for purposes of ad valorem taxation. In computing the value of a mill, Pennsylvania decisions construe all machinery forming an integral part of a mill as real estate, irrespective of its severability from the freehold and regardless of the ownership of the machinery as between the parties.

Pursuant to statutory direction, the taxing body of Allegheny County, Pennsylvania, assessed the Mesta mill. While the assessment was made against the mill, the valuations placed upon the land, buildings and machinery are separately shown. Included in the assessment was the value of certain machinery which had been acquired by Mesta in connection with the manufacture of field guns for the United States Government under its cost-plus-fixed-fee contract. The taxable value of the mill as real estate was increased by $618,000 as a result of the valuation placed upon the machinery acquired in the performance of the Government contract.

Under Pennsylvania law the taxing authorities can elect to tax either the record owner or the real owner of real estate. However, the taxing body had no choice between a record owner and a real owner in the case at bar. Mesta was the only entity against whom the taxing body could impose an assessment for ad valorem taxes. There is no tax imposed by the Pennsylvania taxing statutes upon machinery. Machinery which does not form a part of a mill or manufactory is not taxable. Machinery which forms a part of a mill or manufactory is not taxable *qua* machinery; it simply increases the taxable value of the mill or manufac-

tory as real estate. Since the Government is not the owner or operator of the mill, the taxing authorities could not have elected to tax the Government as either the real or the record owner. Mesta alone could be assessed, for Mesta alone owns and operates a mill which is subject to assessment for ad valorem taxes.

The Government contends that the tax is discriminatory because Mesta has no right of reimbursement from the Government, aside from contract. This argument is fallacious because it is based upon the untenable premise that such a right of reimbursement would be available to Mesta against private parties claiming title in similar circumstances. The record owner of a mill has no right of reimbursement from the owner of a portion of machinery forming a part of such mill. The only right of reimbursement recognized by Pennsylvania decisions is the right of the holder of naked title to real estate to recover from the beneficial owner of such real estate.

The legal incidence of the tax falls squarely upon Mesta and not upon the Government. The fact that the Government by contract has agreed to reimburse the contractor for local taxes imposed in connection with the performance of the Government contract does not, under the recent decisions of this court, confer any immunity from taxation upon the contractor. Cost-plux-fixed-fee contractors have been held by this court to be independent agents and not instrumentalities of the Government. Even though the direct effect of the tax is to increase the cost to the Government, no constitutional immunity exists.

ARGUMENT

The Congress of the United States has not seen fit to exempt from local taxation cost-plus-fixed-fee contractors manufacturing war material for the War and Navy Departments. The Federal Government is attempting to establish such tax immunity by means of judicial determination. It asks this Court in the case at bar to hold that the mere reservation of title by the Government to buildings or machinery purchased by cost-plus contractors immunizes such property from all local real estate taxes. Such a decision would set loose in the law an untenable legal doctrine of far-reaching implications.

The tax involved in the instant case is levied upon machinery assessed at $618,000. The Government asserts in its brief that through the War and Navy Departments and the Maritime Commission the Government owns at the present time seven and a half billion dollars in property which is located on private land or which is operated under private contracts. To sustain the validity of ad valorem taxes on such machinery could substantially increase its cost; to strike such a large sum from the tax rolls would clearly deal a body blow to local governments throughout the country.

Cost-plus-fixed-fee contracts were adopted by the Government in the interest of celerity and economy in the manufacture of the implements of war. By the utilization of established plants throughout the country and the subsidizing of their equipment for war purposes, great savings in time and money were effected. The location of these plants was a matter of military strategy predicated upon factors that need not be considered here. Heavily increased municipal services are required in all communities where large war contracts were placed in order to serve and protect the influx of large numbers of war workers. To nullify all local taxes applicable to such plants,

while imposing greater costs upon local governmental units because of them, would unquestionably result in an uneven distribution of the cost of war.

Any increased cost to the Government resulting from the imposition of the tax will be diffused throughout the country as a whole. If the burden is thrown wholly upon local governments where the war plants are located, they alone will bear that burden. Such local governments will be deprived of the necessary revenue to provide the police and fire protection, health and sanitation facilities and other services necessary for the protection and welfare of the persons and property brought into the community as a result of the war. The only group benefiting by the invalidation of these taxes would be the private contractors who would thus escape bearing a proper share of the cost of local governmental service.

It is in the earnest belief that the position of the Federal Government is unsound, as well as inequitable, that this amicus curiae brief is filed by the National Institute of Municipal Law Officers, which comprises 386 cities and political subdivisions in 46 States. The basic tax structure of local governments is predicated upon receipts derived from the taxation of real estate. The regression in real estate values throughout the country has already created serious financial problems for local governments. The immunity from local taxation of the extensive real estate holdings of the Federal Government has intensified this problem. Despite the trend of recent decisions of this Court narrowing the doctrine of Federal immunity, the Government seeks to revert to the repudiated doctrine of complete immunity for everyone who trades with the Government and everything the Government touches.

The Acquisition of the Machinery

The Mesta Machine Company is the owner of a heavy industrial plant located in West Homestead, Allegheny County, Pennsylvania, where it has manufactured rolling

mill and other machinery for many years. Title to the buildings and to the land on which they are located is in the Mesta Company. Under a taxing statute of Pennsylvania applicable to Allegheny County which provides for the assessment of all real estate, including mills and manufactories, for ad valorem taxes, the Mesta mill—buildings, machinery and land—is assessed as real estate.

On October 30, 1940, Mesta entered into a contract with the United States for the production of large field guns on a cost-plus-a-fixed-fee basis, under authority of the Act of July 2, 1940, c. 508, 54 Stat. 712. In addition to the machinery in the Mesta plant, certain specialized machinery and machine tools were required for the manufacture of these guns, such as lathes, planes, pressers and milling machines. All the requisite machinery and machine tools were large and of the stationary and power-driven type.

The contract between the Government and Mesta provided that the machinery to equip the plant be acquired by Mesta in three ways: (1) purchase by Mesta from other machine manufacturers, (2) manufacture by Mesta at its plant, and (3) remodeling and repairing by Mesta of certain equipment owned by the Government to be delivered to Mesta from its arsenal. Mesta acquired most of the necessary machinery from other manufacturers,[1] manufactured one machine at its plant, and repaired and remodeled eight obsolete lathes delivered to it from the Government arsenal. (R. 26.) All of the machinery was installed in the Mesta plant in specially constructed foundations built to accommodate each type of machine and became an integral part of the mill. (R. 20.) The machines were secured by bolts and removable without damage to the building (R. 21).

With the exception of the machinery procured from the

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[1] The assessed valuation of the machinery acquired by Mesta from other tool manufacturers was $444,000; the machinery manufactured by Mesta, $14,000; the lathes owned by the Government and supplied from its arsenal, $160,000.

Government and renovated at the Mesta plant, none of the machinery was ever in the possession of the Government. Mesta bought it or made it; the Government reimbursed it for the cost. The contract between Mesta and the Government purports to vest title in the Government to all machinery, equipment and material acquired by Mesta in the performance of its contract with the Government (R. 46).

The Imposition of the Tax

In 1942, the Board of Property Assessment, Appeals and Review of Allegheny County, Pennsylvania, revised the assessment made on the Mesta plant during the 1940-1941-1942 triennial for the purpose of including in the assessment for ad valorem property taxes additional buildings, land and machinery which had been acquired by Mesta subsequent to the preceding triennial, in connection with the performance of the cost-plus contract with the Government. The assessment was made pursuant to the provisions of the Act of May 22, 1933, P. L. 853, Article 3, Section 201, as amended by the Act of July 2, 1941, P. L. 219, Section 1, 72 Purdon's Penna. Statutes Annotated, Sections 5020-5021. The applicable section reads as follows:

> "Sec. 201—Subjects of Taxation enumerated:
>
> "The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate:
>
> "(a) All real estate to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries, and ferries, wharves and all other real estate not exempt by law from taxation."

The assessment of the plant was increased from $2,555,590 to $3,901,594. The revised assessment was upon the Mesta manufactory as a whole. Under the practice of Allegheny County, the valuation placed upon land, buildings and ma-

chinery is separately shown.[2] The machinery acquired under the Mesta cost-plus contract with the Government was assessed in this break-down at $618,000 (R. 33). The tax attributable to the assessment of the value of the machinery amounted to $5,137.12 (R. 34).

The contract between the Government and Mesta provides that the contractor shall comply with all applicable laws of the State or subdivision thereof in which the work is performed (R. 46), and for the reimbursement of the contractor by the Government for any payments made by the contractor for any State or local taxes which the contractor is required to pay on any machinery or equipment on account of this contract (R. 43, 53).

The Mesta Machine Company appealed that portion of the revised assessment which imposed a tax on the machinery covered under its agreement with the Government, on the ground that reservation of title to the machinery by the Government rendered it non-taxable. The Government intervened in the appeal, asserting that the reservation of title by it prevented the assessment of the machinery as part of the manufacturing plant of the Mesta Machine Company.

It becomes necessary, therefore, to examine the contract between Mesta Machine Company and the Government for the purpose of ascertaining the validity of the provisions reserving title in the Government and the effect of such provisions upon the taxing powers of the local government where the plant is situated.

I. The Government Does Not Have Title to the Machinery

The Government rests its entire case upon title. It claims ownership of the machinery by virtue of the provisions of

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[2] Total assessment on Mesta Plant $3,901,504
On land 293,795
On buildings 1,123,124
On machinery 2,489,085

the contract between it and Mesta reserving title in the Government to all machinery and materials acquired by Mesta in performance of its contract with the Government. It is respectfully submitted that the contractual provisions with respect to title, while binding as between Mesta and the Government, did not effect a legal transfer of title to the Government valid as against third persons.

Article I-H—Title purports to vest in the Government title to all materials, tools, machinery, equipment and supplies for which the contractor is entitled to reimbursement from the Government. The provision is as follows (R. 46):

> "The title to all work under this Title I, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment, and supplies, for which the Contractor shall be entitled to be reimbursed under this Title I shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this Contract."

Article II-A—Subject Matter provides for the "leasing" to the Contractor of the "Government-owned" equipment (R. 49):

> "1. The Government hereby leases to the Contractor the Government-owned equipment, which the Contractor will have installed pursuant to the provisions of Title I hereof."

Article II-B—Term provides that the term of the lease shall be during the times guns are manufactured under this contract or any supplement thereto (R. 49).

Under *Article II-C—Rental,* the contractor agrees to pay the Government as rental for the entire term or any extension thereof the sum of one dollar (R. 49).

Article II-E—Termination provides that within ninety days after performance of the contract, contractor shall ship the equipment to a point designated by the contracting officer of the Government (R. 50).

In determining whether title has vested as against third persons, the Government is subject to the legal rules applicable to private transactions. One of the fundamental requirements for the transfer of title to personal property in Pennsylvania is that there be a delivery of possession from the transferor to the transferee. Words alone are not enough. The Government attempted to accomplish a transfer from Mesta to it of title to the machinery in the instant case without any change of possession, but merely by providing for the vesting of title in it upon the "acceptance" of the machinery by the contracting officer for the Government *at the Mesta plant* (R. 46).

The "inspection and acceptance" of the machinery by the contracting officer simultaneously with its inspection and acceptance by Mesta agents, in no manner affected the exclusive possession and control of the machinery by Mesta (R. 27). None of the machinery bore any marks of ownership by the Government (R. 20). Most of the machinery bore serial numbers corresponding to serial numbers used in numbering Mesta's regular machinery. (R. 20, 21, 22.) These numbers were cut directly into the machine or stenciled on identification tags attached to the machine (R. 20). Those machines that had no serial number of Mesta were unmarked. The testimony of the assessor is uncontradicted that when the assessment was made none of the machinery was identified by tags or other marks to indicate Government ownership.

Nor was there any change in the control of the machinery. Mesta had the identical possession and control over this machinery that it had over the machinery not covered by the Government contract. The Government exercised no control over it. The contract between the parties contemplated full control by Mesta, for Article II-D-1 (R. 49) spe-

cifically provides that the contractor may use this machinery for *general purposes* as well as in performance of the Government contract. While the Government states that the machinery could be used by Mesta only for work on field guns (Brief of the United States, p. 21, the contract clearly states otherwise.[3]

The conclusion is ineluctable that Mesta is the owner of the machinery. Mesta ordered it, Mesta was billed for it, Mesta received it, Mesta paid for it. The marking of the machinery with serial numbers corresponding to the serial numbers used throughout the Mesta plant, the exclusive control over the machinery by Mesta, the payment of its cost by Mesta,—all are consistent with ownership in Mesta and inconsistent with ownership in the Government.

With the exception of eight lathes delivered to Mesta from the Government arsenal for renovation, none of the machinery was ever in the possession of the Government.

Title to the machinery purchased by Mesta was directly vested in it by the manufacturer and supplier thereof. The reimbursement by the Government of the purchase price did not change the title to the machinery, nor do the provisions of Article I-H of the contract, of themselves and unaccompanied by a change of possession, effect a legal transfer of title valid as against third persons.

A method was provided in the contract between the Government and Mesta for direct acquisition by the Government of machinery to be used by Mesta in its plant. *Article I-D-2* provides:

> "The Government reserves the right to furnish any equipment or materials necessary for the completion

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[3] *Article II-D—General Terms and Conditions.* (R. 49.)

1. The Contractor shall not use any of the equipment herein leased for any purpose other than the manufacture of Guns, • • • complete, without the prior approval in writing of the Chief of Ordnance or his duly authorized representative, except that the *Contractor may use for general purposes such machinery and equipment* as is purchased or furnished to supplement its existing facilities. (Italics supplied.)

of the work under this Title I upon so notifying the Contractor prior to any commitment by the Contractor therefor." (R. 43.)

The Government did not exercise this right save as to the Government-owned lathes.

Article I-G(c) provides for the assignment of the contractor's purchase rights to the Government (R. 46):

"The Contractor hereby agrees that it will:

* * *

"(c) Unless this provision is waived in writing by the Contracting Officer, reduce to writing every contract in excess of two thousand dollars ($2,000.00) made by it for the purpose of the work under this Title I for services, materials, supplies, machinery, or equipment or for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in its own name, and not bind or purport to bind the Government or the Contracting Officer thereunder."

Despite this provision which required contracts by Mesta for the purchase of equipment and machinery to be assignable to the Government, it is significant that no such assignment of purchase rights was ever made. Title to the machinery was in fact acquired by Mesta; the Government elected not to acquire title by direct purchase from tool-manufacturers or by assignment. In the absence of acquisition of valid title by the Government in the first instance, the Government could acquire title from Mesta only by a transfer of title accompanied by a change of possession. Since the possession and control of the machinery by Mesta was in no manner disturbed by its contract with the Government, Mesta's original title was never divested. As a consequence, legal title, valid as against third persons, was never acquired by the Government.

The law is well settled in Pennsylvania that a sale of personal property leaving the vendor in possession, with-

out the exercise of any control over the property and without doing anything to indicate a change in ownership, is fraudulent as against third persons.

While the decisions do not set up an unbending test of the sufficiency of delivery and retention of possession to be applied in all cases, it is clear that to transfer title the purchaser must take such control of the property as the circumstances permit which would indicate a change in ownership.

This principle was first enunciated in *Clow* v. *Woods*, 5 S. & R. 275 (1819), wherein Justice Gibson declared, at p. 279:

> "The law will not and ought not to permit the owner of personal property, to create an interest in another, either by mortgage or absolute sale, and still to continue to be the ostensible owner."

The courts of Pennsylvania have consistently followed this doctrine. In *Enterprise Wall Paper Co.* v. *Rantoul*, 260 Pa. 540, 106 Atl. 198 (1918), a manufacturer of wall paper agreed to sell its entire output to the Enterprise Company for a year. Under the terms of the agreement, all raw material necessary for the manufacturing of wall paper was to be ordered by the manufacturer, billed to Enterprise and paid for by Enterprise. The parties agreed that all raw material purchased by the Enterprise Company under the terms of this agreement should remain the property of the Enterprise Company. There was no change of possession.

The court held that Enterprise did not have title to the raw material as against third persons. Title was held to remain in the manufacturer until a legal delivery was made.

A similar conclusion was reached in *Shipler* v. *New Castle Paper Products Corp.*, 293 Pa. 412, 143 Atl. 182 (1928). The court there held that the mere payment of a selling price for the materials used in manufacturing the finished product is not sufficient to protect the buyer if there has been no

delivery, irrespective of the good faith of the purchaser. We quote from the opinion of the court at page 420:

> "Assuming there was a completed sale, as insisted upon by the appellant, there was no actual delivery of possession. The most that can be urged is that it was a constructive one. Section 26 of the Uniform Sales Act provides: 'Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.'
>
> "From the early case of Clow v. Wood, 5 S. & R. 275, to the latest declaration in Wendel v. Smith, 291 Pa. 247, it has uniformly been held in this State that there must be an actual or constructive delivery of property sold to protect against attaching or levying creditors of the seller, and, if nothing be shown which indicates an adequate change of possession, the transfer will constitute, as to them, a legal fraud. . . . If he advances the consideration for goods bought without taking possession, he assumes the risk of the integrity and solvency of his vendor when the rights of bona fide purchasers or execution creditors arise, for delivery, actual or constructive, is indispensable to transfer a title that shall be effective against such parties."

It is noteworthy that in the above cases title was predicated upon a stronger fact situation than obtains in the case at bar. In the cases adverted to, the raw materials were billed to and paid for by the vendee; in the case at bar, Mesta paid for the machinery and was reimbursed by the Government.

In *Callahan* v. *Union Trust Co. of Pittsburgh*, 315 Pa. 274, 172 Atl. 684 (1934), a purported sale and bailment lease were held invalid as to third persons. The facts there were as follows: The Western Pennsylvania Amusement Company operated the Regent Theater. In consideration of a loan of money by Callahan, the amusement company executed a bill of sale covering all personalty on the premises

and used in connection with the operation of the theater. After the execution of the bill of sale, Callahan went to the theater and, in the presence of the manager and another employee, checked the items listed in the schedule attached to the bill of sale, in several instances placed his hand upon the articles and declared the property indicated was his and should not be moved from the theater without his consent. He also attached a rider to the insurance policies showing his interest.

On the day following the execution of the bill of sale, Callahan executed a lease agreement with the amusement company, leasing the personal property covered by the bill of sale to the amusement company for a term of eight years. The equipment and fixtures involved in these two transactions remained and were used as theretofore in the theater, which continued to be operated and controlled by the amusement company.

The case came before the Supreme Court of Pennsylvania after an attachment of the property by a judgment creditor of the amusement company. The court held that the bill of sale and the bailment lease executed under these circumstances did not transfer title to Callahan which was valid as against third persons. The action of Callahan in checking the items covered by the bill of sale, placing his hand upon the articles and noting his interest in the insurance policies, was held not to be such an exercise of control as to create a valid sale.

Under the principle there established, it is clear that the action of the contracting officer for the Government in inspecting and accepting the machinery at the Mesta plant, did not constitute either a change of possession or the exercise of control requisite for the transferring of valid title.

The Government has recognized the basic law of Pennsylvania requiring the delivery of possession or change of control to transfer title to personal property, and has complied with it where transfer of title was necessary to afford it security for money advanced. In *Commonwealth Trust*

Co. v. *Reconstruction Finance Corp.*, 120 Fed. (2d) 254 (1941), the Circuit Court of Appeals for the Third Circuit, while recognizing the continuing validity of the doctrine that delivery of possession or assumption of control is indispensable under Pennsylvania law to transfer of title, held that the delivery of possession was adequate where the pig iron in controversy was placed on land leased to the Reconstruction Finance Corporation, where the land was enclosed with a fence and marked with signs of the Reconstruction Finance Corporation and in possession and control of its custodian. We quote from the opinion of the court at page 257:

> "Notwithstanding the absence of any intent to defraud, either actual or constructive, it is the appellant's contention that the pledge was so ineffectually created as to amount to a fraud on third persons, citing and relying upon Clow v. Woods, 5 Serg. & R., Pa., 275, 9 Am. Dec. 346. It was there held that delivery of possession of pledged goods or chattels is legally indispensable to the validity of the pledge so far as the rights of third parties are concerned. Such, we believe, is the law of Pennsylvania and that there has been no deviation from the rule stated in Clow v. Woods. . . ."

How did the Government overcome the force of these decisions? In the light of established Pennsylvania law, what cases did the Government cite in the lower court to buttress its claim of title to the machinery acquired by Mesta? The startling fact is that the Government cited no authorities whatever in support of its claim of title: the Government simply claimed it was the owner of the machinery, Mesta concurred, and the Supreme Court of Pennsylvania ruled that ownership did not matter. Proof of title in the Government was held by the appellate court to be irrelevant and therefore improperly admitted in evidence (R. 102). The appellate court held that, under Pennsylvania taxing statutes, machinery in a manufacturing plant or mill is assessable as real estate against the record owner of the

mill *regardless of ownership.* Under the view of the court, an inquiry into the validity of title claimed by the Government by virtue of its contract with Mesta was unnecessary. We quote from the opinion of the Supreme Court:

> "Furthermore, this private arrangement between the Mesta Company, the owner of the land and buildings and operator of the mill, and the Federal Government, the owner of the machinery, which treats the equipment as personal property and permits the latter to remove it at the termination of the contract, can in no way change the legal effect of the Act of Assembly which specifically designates machinery, under these circumstances, as real estate for tax purposes. (R. 98.)
>
> * * *
>
> "We are satisfied that the evidence that the machinery was not owned by Mesta Company was irrelevant and therefore improperly admitted." (R. 102.)

Since the Government asserts that its title to the machinery is of controlling importance in this case, a thorough inquiry into the validity of such title is a primary consideration. Where the law of a State does not permit the owner of personal property to sell it and still continue in possession of it, the courts of the United States will follow the State law: *Dooley* v. *Pease,* 180 U. S. 1260 (1900).

In its brief filed with this court, the Government again cites no authorities in support of its title to the machinery. No such authorities exist. The Pennsylvania decisions are uniform in their requirement of a change of possession or control to perfect a valid transfer of title to personal property. The record in the case at bar is devoid of any evidence of change of possession or control. The only act of ownership relied upon by the Government is the "acceptance" of the machinery by the contracting officer for the Government at the Mesta plant. As was heretofore shown, this act alone does not measure up to the requirements of the Pennsylvania law with respect to the transfer of title to personal property. The private arrangement between the Govern-

ment and Mesta does not change the law where the rights of third persons are concerned.

The Government refers casually to conclusions by the lower court and Supreme Court that title was in the Government. (Brief of the United States, pp. 23, 24.) No such findings were, in fact, made. Although the trial court *assumed* ownership in the Government and based its conclusion that the tax was invalid on the ground that a municipality cannot tax Government-owned property, it made no such finding. The Supreme Court of Pennsylvania specifically ruled that, where machinery becomes a part of a manufacturing plant or mill, it is assessable as the real estate of the record owner of the mill and that the question of the title to the machinery is irrelevant. We quote from the opinion of the Supreme Court (R. 100):

> "To exempt the machinery from taxation would not be in relief of the Government but rather in relief of Mesta Company, and therefore it is clear that the machinery is the proper subject of assessment for tax purposes as the property of the Mesta Company *even though legal title is actually in the Federal Government.*" (Italics supplied.)

From this language, the Government now argues that the Supreme Court recognized that at the time of the assessment the United States owned the machinery and that "legal title to it" was "actually in the Federal Government"—(Brief of the United States, p. 24).

Clearly, the language used by the court arguendo cannot be converted into a "finding" of title in the Government. Nor did counsel for the taxing body concede ownership in the Government (R. 23, 29, 30). It took the position which the Supreme Court approved and adopted, namely, that, *irrespective of title*, machinery which formed an integral part of a mill is assessable as real estate (R. 102). The conclusion is inescapable that this oblique attempt of the Government to preclude an examination into the validity of the

Government's title stems from a recognition of its invalidity.

The Government concedes that Mesta is an independent contractor and not an agent or instrumentality of the Government—doubtless because this court recently so held under similar circumstances.[4] The Government concedes that the fact that it is required to reimburse Mesta for taxes paid does not render the Government immune—doubtless because this court has so held in recent cases involving similar facts.[5] The Government itself has closed the doors to all possible avenues of escape from the tax save that of title and that road leads to Mesta.

This is not the first time the Government has attempted to avoid the imposition of local taxes on the ground that title to the taxed article was in the Government. The same claim was made by the Government in *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941). There the Government sought to avoid the payment of a sales tax imposed upon a supplier of material to a cost-plus contractor working for the Government. The Alabama statute imposed a tax upon the seller, but made it collectible from the purchaser. The Government claimed it was the purchaser within the meaning of the Alabama statute because it had title to the material.

Under the heading, "The Purchases Made through the Cost-Plus Contractor Are Those of the United States," the following argument is made by the Government at page 89 of the Brief filed by it in the United States Supreme Court:

> "TITLE. The contract makes it plain that, from the moment of its purchase, the United States has title to all work and material. Title to the work completed or in the course of construction is in the Government. Upon delivery and inspection, title to all materials, tools, machinery and equipment and supplies vests in the United States."

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[4] *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941); *Curry* v. *United States*, 314 U. S. 14 (1941).

[5] *Alabama* v. *King & Boozer*, supra note 4; *Curry* v. *United States*, supra note 4.

The Supreme Court held that the reservation of title by the Government did not constitute it a purchaser so as to prevent the imposition of the tax upon the cost-plus contractor. We quote from the opinion of Chief Justice Stone, at page 13:

> "*The Government,* to support its thesis that it was the purchaser, *insists that title to the lumber passed to the Government on shipment by the seller,* and points to the very extensive control by the Government over all purchases made by the contractors. It emphasizes the fact that the contract reserves to Government officers the decision of whether to buy and what to buy; that purchases of materials of $500 or over could be made by the contractors only when approved in advance by the contracting officer; that the Government reserved the right to approve the price, to furnish the materials itself, if it so elected; and that in the case of the lumber presently involved, the Government inspected and approved the lumber before shipment. From these circumstances it concludes that the Government was the purchaser." (Italics supplied.)

The contract between the Government and the Dunn Construction Company in that case and the contract between the Government and Mesta in this case are practically identical with respect to the provision for the reservation of title. We quote from the contract between the Government and Dunn Contracting Company at page 51 of the Supreme Court record in *Alabama* v. *King & Boozer:*

> "Article I-3. The title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Article II, shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the contractor from any duties imposed under the terms of this contract."

The contract provision with respect to title in the case at bar is as follows (R. 46):

> "Article I-H—Title. The title to all work under this Title I, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under this Title I shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract."

The contracts, moreover, were identical with respect to the provisions for assignability to the Government, making purchases direct instead of through the contractor, the reimbursement of the contractor for the price of all materials purchased and reimbursement for taxes imposed upon the contractor as a result of its contract with the Government. This court held that *King & Boozer,* the supplier of the lumber to the contractor, was subject to the sales tax and that the provisions of the contract did not constitute the Government the purchaser within the meaning of the Alabama statute which imposed a legal obligation on the purchaser to pay the tax.

In that case as in this, the contractor ordered the material, the contractor was billed for the material, the contractor paid for the material, and the Government reimbursed it for the cost. If title did not best in the Government in *Alabama* v. *King & Boozer* so as to constitute it a purchaser of the lumber, how can it be held that the identical contract provisions vest title in the Government as the purchaser of the machinery in the case at bar?

In determining who was the purchaser, this court held that the law of Alabama and its decisions would control. It is submitted that, in determining whether title to the

machinery in question vested in the Government under the provisions of the contract in the case at bar, the law of Pennsylvania and its decisions must control. Since under the law and the decisions of the appellate court in Pennsylvania change of possession and control is necessary to vest title as against third persons, the Government never became a valid purchaser of the machinery and therefore never had title.

Once it is established that the Government never had title to the machinery in question, it follows that the purported "leasing" to Mesta was not a valid bailment. The Government could not become the bailor of machinery it did not own, nor could Mesta become the bailee of property to which it continued to hold legal title. Mesta cannot at the same time occupy the contradictory legal positions of owner and bailee.

The Government's case rests squarely upon its claim of title to the machinery in question. Since title is not in the Government but in the Mesta Machine Company, the Government's case collapses.

The language of the court in *Root* v. *Republic Acceptance Corp.*, 279 Pa. 55, 123 Atl. 350 (1924), is peculiarly apt:

> "Appellant stands upon the proposition that the relation between it and the Averill Company was that of bailor and bailee; failing to sustain this position it is worsted, as except for this relation, it has no standing at all as against the trustee. There can be no bailment if there was no sale; and the sale was void as to creditors."

II. The Reservation of Title Was for the Protection of the Government from Mesta and Not for the Protection of Mesta from the Taxing Authorities

The contract between the Government and Mesta contemplated the payment of all taxes imposed by the State or any political subdivision upon the machinery. *Article I-H*,

which purports to reserve title in the Government, contains the following important qualification (R. 46):

> "These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this Contract."

Article I-G(b)—Special Requirements Applicable to Title I (R. 46), which immediately precedes this provision for title, provides that the contractor is required to obey and abide by all applicable laws of the State or political subdivision wherein the work is done.

One of the laws applicable to the contractor is the Assessment Act of the State of Pennsylvania, providing for the assessment of ad valorem taxes on all real estate, including the machinery of manufacturing plants.

Article I-D(g) specifically provides for reimbursement by the Government for money expended by the contractor on account of any State or local taxes imposed on the plant or equipment covered by the contract (R. 43):

> "(g) Payments from his own funds made by the contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used, including those owned by the Contractor."

Article III-E, in sub-paragraph (b) under Taxes, provides for reimbursement of sales or transaction taxes (R. 53):

> "(b) State, County, and Municipal Taxes.—The contract prices as stated in Article III-D herein do not include any tax imposed by any state, county, or municipality upon the transaction of this purchase of guns. The Government shall not be liable, directly or indirectly, for the payment of any such taxes, except that if the Contractor after using every effort short of

> litigation to procure exemption or refund, as the case may be, should be compelled to pay to any state, county or municipality, any tax upon the transaction of this procurement, an amount equal to the tax so paid shall be paid by the Government on demand of the Contractor, in addition to the prices herein stated."

It would seem, therefore, that the Government fully contemplated the imposition of local taxes against the machinery and the reimbursement of the contractor for payment of such taxes. The conclusion is inescapable that the reservation of title was intended as a measure of protection as against the contractor and not as against third persons or the taxing authorities. However, irrespective of intention, the law is clear that the private arrangement between the Government and Mesta cannot operate to vest title in the Government as against third persons.

III. Machinery Forming an Integral Part of a Mill or Manufactory Is Assessable as Real Estate for Tax Purposes

Under Pennsylvania law, machinery in a manufacturing plant or mill is part of the freehold and assessable as real estate. This has been the consistent position of Pennsylvania courts. We quote from the decision of the court in the early case of *Gray* v. *Holdship*, 17 S. & R. 413 (1828), at page 415:

> "From the adjudged cases on this subject I think we are warranted in saying that everything put into and forming part of a building, or machinery for manufacturing purposes, and essential to the manufactory, is part of the freehold; the wheels of a mill, the stones, and even the bolting cloth, are parts of the mill and of the freehold, and cannot be levied on as personal property. . . ."

In *Patterson* v. *Delaware County*, 70 Pa. 381 (1872), the court held taxable as real estate the machinery of a cotton factory. The statute under which the assessment was made

was the Act of April 28, 1844, P. L. 486, Sec. 32,[6] which section is practically identical with Section 201 of the Act of 1933, P. L. 853, as amended, under which the assessment was made in the instant case.[7]

Nor is the degree of attachment to the freehold of controlling importance. The machinery in the case at bar is very heavy and is installed in concrete foundations specially constructed to accommodate it. Although it is attached by bolts and removable without damage to the building, its severability does not convert it into personalty. We quote from the opinion of the court in *Patterson* v. *Delaware County, supra,* at page 385:

> "If what he denominates *machinery* is to be cast out in the assessment of mills, what is to be included? Simply the bare walls? That would hardly be claimed. But where else could we draw the line? According to the old rule by which it was sought to distinguish between real and personal property—*physical annexation?* That has been found impracticable, no rule at all, and has, therefore, long since been abandoned."

The fallacy inherent in the severability test is succinctly stated in the opinion of Chief Justice Gibson in *Voorhis* v.

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[6] *Sec. 32, Act of April 28, 1844, P. L. 486:* "All real estate, to wit, houses, lots of ground, ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar-houses, malt-houses, breweries, vineyards, fisheries, ferries, wharves, and all other real estate not exempt by law from taxation, shall be valued and assessed for all state and county purposes."

[7] Sec. 201, Art. 3, *Act of May 22, 1933,* P. L. 853, as amended by the *Act of July 2, 1941,* P. L. 219, Sec. 1, 72 P. S. 5020-S. 201

"Subjects of Taxation enumerated: The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate: (a) All real estate to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar-houses, malt-houses, breweries, tan yards, fisheries, and ferries, wharves and all other real estate not exempt by law from taxation."

Freeman, 2 W. & S. 116. We quote from the opinion of the court:

> "The criterion of physical annexation is too limited in its range and so productive of contradictions, even in regard to fixtures in dwelling houses, to which it was adopted before England had become a manufacturing country, that it will answer for nothing else. The courts will be drawn away from it by its narrowness and want of adaptation to the business and improvements of the age. From the force of habit they have adhered to it after it has ceased to be a guide; for nothing but a passive regard for old notions could have led them to treat machinery as personal property when it was palpably an integrant part of a manufactory or mill, merely because it might be unscrewed or unstrapped, taken to pieces and removed, without injury to the building."

The court there held that all machinery, whether attached or loose, which is necessary to constitute a manufacturing plant must pass as part of the freehold. A similar conclusion as to the machinery in a woolen mill was reached in *Guthrie* v. *Pittsburgh Dry Goods Co.*, 47 Pa. Superior Ct. 384 (1911).

The Government is in error when it asserts, "Moreover it may be noted that the assessment of January, 1942, was not made on the theory that the Government's machinery merely enhanced the value of the lands and buildings concededly owned by Mesta. The machinery was listed as a separate taxable item." (Brief of the United States, Footnote, p. 23.) To the contrary, the assessment was made on the theory that the machinery acquired by Mesta in the performance of the Government's contract enhanced the value of the Mesta plant. While under the practice in Allegheny County the breakdown of land, buildings and machinery is separately shown, the assessment is against the plant as a whole. In this connection, we quote from the pertinent opinion of the court in *Guthrie* v. *Pittsburgh Dry Goods Co.*, supra, where the assessment as in the case at bar was made against a factory and the assessments against the building,

land, improvements and machinery were separately shown (p. 386):

> "The statement shows the assessment of the real estate to stand in this form: 'Factory building, $25,000; four acres, $400; improvement and machinery, $25,000.'
>
> "As we understand it, the 'improvement and machinery' are in the aforesaid 'factory building,' and the 'factory building' is located on the 'four acres.' Therefore, what is enumerated above in the form of three separate items is but a mode of describing a single subject of taxation, by an enumeration of its several constituents—and the aggregate of the valuations placed on these several constituents is, in each of the assessments, the basis to which the fixed rate of taxation for real estate has been applied.
>
> "*The levy is on the aggregate of the valuations.* The rate is the rate appropriate to a real estate tax, and no attempt has been made to levy any other kind of a tax. While the enumeration of the constituents of a single subject of taxation, when looked at from a purely logical and legal standpoint, may not be the best mode of procedure, yet it is a mode that is often pursued in actual practice, and is not violative of any legal right of the taxpayer." (Italics supplied.)

The decision of the Supreme Court of Pennsylvania in the case at bar, that the machinery in question formed a real and permanent part of the mill of the Mesta Company and was therefore subject to assessment as real estate, is in conformity with the established law of Pennsylvania.

IV. Reservation of Title by the Government Cannot Change the Legal Effect of an Assessment Statute Which Designates Machinery in Plants and Mills as Real Estate

It is the position of the Government in this case that the reservation of title by it to the machinery installed in the Mesta plant prevents the inclusion of this machinery in the assessment of the Mesta plant. The fundamental ques-

tion before this court is whether the private arrangement between Mesta, the owner of the land and buildings and operator of the mill, and the Federal Government, the purported owner of the machinery, can change the legal effect of a taxing statute which provides for the taxation of machinery in plants as real estate.

The decisions in the Commonwealth of Pennsylvania are uniform that private arrangements between the owner of the land and the owner of machinery cannot change the character of the property for tax purposes. In *Guthrie* v. *Pittsburgh Dry Goods Co.*, 47 Pa. Superior Ct. 384 (1911), the court held that the owner of land and buildings cannot deny his liability under a tax statute because the machinery which composed a permanent and essential part of the manufactory was owned by a tenant who had a right to remove it at the end of his lease. We quote from the opinion of the court (p. 401):

> "Does the private arrangement between the tenant and the landlord which permitted the former to remove the machinery at the end of the term change the character of the property as affected by the taxing statutes? We think not. . . . If the machinery is not to be included there is no manufactory to be taxed and the land and building would be liable not as a factory but as 'other real estate' as provided in the same section of the statute. The property is either a manufactory or it is not. If a manufactory it is clearly subject to taxation under the specification of that class of property."

A similar conclusion was reached in *Bemis v. Shipe*, 26 Pa. Superior Ct. 42 (1904), where the court clearly distinguished between the effect of a private arrangement between the parties and the effect as to taxing authorities. There the court said:

> "It may be admitted that, as between the owners of the land and the owners of the mill, the latter may be regarded and treated by them as personal property, and yet it by no means follows that in contemplation of law for other purposes it is not real estate. Without

the express permission of the owners of the land to remove the buildings prior to a certain date, if nothing whatever had been said in regard to them in the original lease, they would doubtless belong to the owners of the land at the expiration of the lease, as being part of the real estate, but such permission does not change the physical character of the property, nor does it in any way change its legal status, except as between the parties themselves and those claiming under them and as to the legal machinery through which the title of the lessees may be transferred to creditors or others who desire to secure their rights."

A clear exposition of the law is contained in *Pennsylvania Stave Company's Appeal,* 236 Pa. 97 (1912), where the Supreme Court held that a manufacturing plant consisting of a sawmill, houses, shops, sheds and barn, is taxable as real estate, although the structures stood upon land leased for a term of years with a right in the lessee to remove the buildings and machinery at the end of the term. We quote from the opinion of the court at page 101:

"It will be noticed that under the general term 'real estate' the act specifically names many kinds of structures to be included as proper subjects of taxation. Houses, mills and manufactories of all kinds are included in the enumeration with the evident intention of making them subjects of taxation as real estate. There is no suggestion that the taxation of houses, mills and factories is made to depend upon the kind or character of the estate the owner may have in the land upon which the buildings are located. The taxing statutes look to the nature of the structure, whether it be permanent or not, rather than to the technical legal distinctions as to what constitutes real estate. If it had been otherwise intended it would not have been necessary to designate the different kinds of improvements which should be subject to taxation as real estate.

"The legislature had the power to say what kinds of property should be taxed as real estate and it exercised this power in the Acts of 1834 and 1844. The property involved in this proceeding comes within the express

provisions of these statutes, and it would be sticking in the bark to hold that this valuable estate should be exempt from taxation because the stave company was not the owner of the fee in the land demised to it for a term of years. In this connection it should not be overlooked that the stave company is the owner of the sawmill, houses, sheds, shops and barn, with the right to remove the same at the expiration of the term, and that during the occupancy of the land, it has an estate in the demised premises. In no proper legal sense can the buildings in question here be considered trade fixtures, nor can they be treated as personal property under our taxing statutes."

In Pennsylvania, the registered owner of land is liable for taxes assessed against the land during the time of such registration whether in fact an owner or not. We quote from the leading case of *Pennsylvania Company* v. *Bergson*, 307 Pa. 44, 159 Atl. 32 (1932), at page 51:

> "When a deed or other conveyance is duly recorded and registered in the name of a given person, he, as the registered title holder, is regarded as the 'owner' for purposes of assessment and taxation, and is personally liable for taxes levied on the property. This liability attaches because he holds himself out to the world through public records as owner by being registered and recorded as owner. . . . These authorities may, for the purpose of taxation, treat individuals in their several relations as they appear on the designated indices or the public records that are provided."

The Supreme Court of Pennsylvania has held in this case that the Mesta Machine Company could not avoid the imposition of the tax by its private arrangement with the Federal Government. The majority of the court held as follows: "Nor can the Mesta Company, by its private arrangement acknowledging that the Federal Government has title to the machinery which is an integral part of the mill of the company, evade the right of the County to assess the company as the owner of the mill erected upon land title to

which is in its name upon the public records. The mill of the company was taxable under the statute as real estate, and this necessarily included the machinery essential to the existence and operation of that manufactory." (R. 98.)

To hold otherwise would result in Mesta's using the machinery for Government work and for private work—this is specifically permitted under Article II-D-1 (R. 49)—tax free. It is submitted moreover that leasehold interests on land are taxable even when the fee or reversion is tax exempt. Mesta's interest in the machinery is taxable whether its interest be that of an owner or lessee.

In *Franklin County* v. *McLean*, 93 Pa. Superior Ct. 165 (1928), the Commonwealth of Pennsylvania had leased ground as a site for a temporary building for a term of ten years, with the right in the lessee upon the termination of the lease to remove the building placed thereon by him. The local assessors assessed as real estate the property of the tenant for the imposition of an ad valorem tax thereon. The tenant moved to strike off the assessment, claiming that, since the fee was in the Commonwealth, the property was tax exempt under the Constitution and the interest of the lessee was therefore not taxable.

The court held that the fact that the Commonwealth was the owner of the land did not prevent the taxing authorities from assessing as real estate the interest of the tenant which, under Pennsylvania statutes, was assessable as real estate. We quote from the opinion of the court at page 172:

> "The State's sovereignty in the forest reserve lands so guards them that its title thereto cannot be divested by a tax sale by the local tax gatherer. But in our view, the sovereignty does not prohibit the taxation of an estate of a lessee in a part thereof, which falls within the express provisions of the Acts of 1834 and 1844."

As heretofore pointed out, the Acts of 1834 and 1844 are practically identical with the instant act, which would make the reasoning of the court as persuasive today as it was then.

The Government takes the position in its Brief (Brief of the United States, p. 27) that under Pennsylvania decisions property owned by a State or its political subdivisions is not taxable even though revenue is derived from the leasing of such property. In support of this proposition, the Government cites the case of *Dornan* v. *Philadelphia Housing Authority*, 331 Pa. 209 (1938). In that case the Supreme Court of Pennsylvania held that the fact that revenue is derived from housing projects does not preclude the existence of a public use. The exemption of the property from taxation was clearly predicated upon its being devoted to a public use.

Dornan v. *Philadelphia Housing Authority* is clearly distinguishable on its facts from the instant case. There are several cases in Pennsylvania decided after the *Dornan* Case which specifically rule that a political subdivision is not tax exempt where its property is leased for private purposes even though the receipts are thereafter used for public purposes. The Government appears to have overlooked the more recent case of *Pittsburgh School District* v. *Allegheny County*, 347 Pa. 101 (1943), wherein the Supreme Court of Pennsylvania held that a county can levy a real property tax upon land owned by a school district and leased to a private person for a commercial enterprise even though the income from the property is used for school purposes. Similar conclusions were reached in *Kittanning Borough* v. *Armstrong County*, 347 Pa. 110 (1943) and in *Easton* v. *Koch*, 152 Pa. Superior Ct. 327 (1943), Advance Sheets.

It is urged that where the obvious intent of an agreement is not to effect a bona fide transfer of ownership but is for the purpose of affecting the tax status, the courts will look into the realities of the transaction. While parties may change the ownership of property by agreement, such agreements are binding only as between the parties and have no binding effect upon third persons or taxing authorities. An assessor of real estate is not required to look be-

yond the manifest character of a building in order to ascertain its taxable status. If the purpose of the reservation of title in the instant case was to avoid the payment of local taxes by the contractor, it has no effect whatsoever as against the taxing authority. Clearly, such a tax avoidance plan by private persons would be summarily disposed of by the court; a tax avoidance plan entered into by the Government is equally assailable.

It is respectfully submitted that, where the Government subsidizes the purchase of machinery by a contractor and consents to its installation in a plant to which the contractor has title, the machinery becomes a part of the manufacturing plant and subject to all local taxes applicable to such plant. The doctrine of the immunity of Federal property from local taxation cannot be invoked in such circumstances.

The Government takes the position that even if the Assessment Statutes of Pennsylvania authorize assessment of this machinery as part of the real estate of Mesta were the machinery owned by a private person, the same conclusion cannot be reached where the machinery is owned by the United States. It becomes necessary therefore to examine the doctrine of Federal immunity and to determine whether the assessment in the case at bar was valid under the Constitution of the United States.

V. The Development of the Doctrine of the Immunity of Federal and State Governments from Taxation

When a legal principle is announced in terms of sweeping absolutes, it becomes so imbedded in the body of the law that it may remain unchallenged for generations. The resounding phrase of Chief Justice Marshall in 1818, that "the power to tax involves the power to destroy," was strengthened by mere repetition over the years. The doctrine of Federal immunity from State taxation was extended to include a reciprocal immunity of State instrumentalities from Federal taxation. A century elapsed before the validity of the broad doctrine of implied Federal

immunity established in *McCulloch* v. *Maryland* was re-examined and questioned.

State and local governments experienced limitations on the doctrine of immunity from Federal taxation long before the Federal doctrine of immunity was limited. The expansion of State activities was early and rapid. State and local governments entered fields of activity and exercised functions that were originally performed solely by private enterprise. If such instrumentalities were construed to be tax exempt, the taxing power of the Federal Government would have been greatly curtailed. The courts met the problem by curtailing the implied doctrine of State immunity.

In *South Carolina* v. *United States*, 199 U. S. 437 (1905), the exemption of State instrumentalities from Federal taxation was specifically limited to instrumentalities of a strictly governmental character and were held not to extend to instrumentalities used by the State in performing a proprietary function. The sale of liquor by State operated liquor stores was held by the Supreme Court not to meet the "essential governmental function" test and was therefore declared taxable by the Federal Government. The doctrine of State immunity established in *Collector* v. *Day*, 11 Wall 113, was drastically restricted by the adoption of the "essential governmental function" test.

In *Helvering* v. *Gerhardt*, 304 U. S. 405 (1938), an additional test was applied to State instrumentalities,—the "economic burden" test. The salary of a construction engineer of the Port of New York Authority, created under an Act of Congress by an agreement between the States of New York and New Jersey, was held subject to Federal taxation. This court held that, where the burden of the tax falls directly on the taxpayer and only indirectly on the State instrumentality, there is no immunity from taxation. We quote from Mr. Justice Stone at page 424:

> "We decide only that the present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state

government. So much of the burden of the tax laid upon respondent's income as may reach the state is but a necessary incident to the co-existence within the same organized government of the two taxing sovereigns, and hence is a burden the existence of which the Constitution presupposes. The immunity, if allowed, would impose to an inadmissible extent a restriction upon the taxing power which the Constitution has granted to the federal government."

Mr. Justice Black pointed out, in a concurring opinion, the confusion resulting from the application of the "essential governmental function" test and the necessity for restricting the doctrine evolved in *Collector* v. *Day*.

South Carolina v. *United States* and *Helvering* v. *Gerhardt* clearly evidenced the refusal of the Supreme Court as constituted in 1938 to extend the doctrine of State immunity or to give it the broad interpretation which had been given the doctrine of Federal immunity. The imposition of the "essential governmental function" test and the "economic burden" test operated inevitably to emasculate the doctrine of immunity as applied to the States.

VI. The Narrowing of the Doctrine of Federal Immunity from Taxation

The broad doctrine of Federal immunity as originally enunciated was predicated upon an implied prohibition in the Constitution against the States imposing any tax or burden, however indirect, upon the sovereign power of the Federal Government. In the early application of this doctrine, the immunity of the Federal Government was extended to all persons who did business with the Federal Government.

Thus, in *Telegraph Co.* v. *Texas*, 105 U. S. 460, 26 L. ed. 1067 (1882), the imposition of a State tax on messages sent out by the telegraph company doing business in the State was held invalid as to Government messages. As to such messages, the court held that the imposition of the tax on

the telegraph company would in effect result in taxing an agency of the Federal Government. Under the decision in this case and companion cases, contractors supplying the Federal Government or any of its instrumentalities with gasoline, lumber or any other materials or services, become Governmental agencies as regards the immunity of their government business from State taxation.

It is significant that the essential governmental function test applying to the State and its instrumentalities was never applied to the Federal Government. The Federal Government is one of delegated powers in the exercise of which Congress is supreme. The courts have therefore held that every agency which Congress can constitutionally create is a Governmental agency performing a governmental function.

As the Federal Government began to expand its activities to an unprecedented extent, a broad construction of the immunity doctrine would have removed from local taxation independent contractors supplying the Federal Government or its instrumentalities with commodities or services. The courts at that point began to limit the broad doctrine of Federal immunity. Thus, in *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore*, 195 U. S. 375 (1904), the court held:

> "It seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from State taxation either in its corporate person or in its property because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

Similarly, in *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319 (1916), the court held:

> "But mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies and confer freedom from State control."

In *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218 (1928), a gasoline tax on dealers imposed by the State

of Mississippi was held invalid where the gasoline was sold to the Government. The court held that the necessary effect of the tax was to burden the United States in the exercise of its functions. A similar conclusion was reached in *Graves* v. *Texas*, 298 U. S. 393 (1936), where the State of Alabama sought to collect taxes imposed on dealers selling gasoline directly to the United States.

In the *Panhandle* Case, the doctrine of Federal immunity was re-examined and challenged by the dissenting opinion of Justice Holmes, concurred in by Justice Stone. The case marks a turning-point in judicial thinking on the subject of Federal immunity.

The gradual limitation of the doctrine of Federal immunity was continued in *Trinityfarm Construction Co.* v. *Grosjean*, 291 U. S. 466 (1934), in which the State of Louisiana attempted to collect a tax on gasoline of the contractor, used to supply power for machinery used in the construction of levees by the contractor for the Federal Government. The Supreme Court held the tax valid, declaring there was no difference for taxation purposes between machinery which was admittedly taxable and the gasoline. The tax on the gasoline was declared to create a remote and not direct burden upon the Federal Government.

In *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937), this court held that the burden of a State tax on the gross receipts of a construction company doing Government work imposed too indefinite and remote a burden on the Federal Government to be held invalid.

It is noteworthy that Justice Holmes, in filing a dissenting opinion (concurred in by Justice Brandeis and Justice Stone), in *Panhandle Oil Co.* v. *Miss. ex rel. Knox, supra*, was of the opinion that a sales tax imposed upon the Federal Government itself would be valid. We quote from the dissenting opinion of Justice Holmes at page 224:

> "To come down more closely to the question before us, when the Government comes into a State to pur-

chase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the State and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else. The cost of maintaining the State that makes the business possible is just as necesary an element in the cost of production as labor or coal."

The narrowing doctrine of immunity established by recent decisions of this court would indicate that a nondiscriminatory sales tax imposed upon the Federal Government would be upheld even where the purchase was made directly by the Government and not by an independent contractor as in *James* v. *Dravo Contracting Co.*, supra.

The doctrine that the Federal Government could not be burdened in any way was departed from, and a new rule that only a direct burden could confer immunity, was established in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (1939), where this court held that the State of New York could tax the income of employees of the Home Owners' Loan Corporation, a Federal instrumentality.

Prior to this decision, the Supreme Court had always taken the view that the immunity of a Federal instrumentality had to be waived by Congress in order to subject an instrumentality to a State tax, but *Graves* v. *New York ex rel. O'Keefe* adopted the view that silence on the subject of immunity by Congress did not imply immunity. The test of immunity when Congress was silent was held to be the nature and effect of the burden placed upon the Federal Government by the tax in question. The court held that the burden on the government of a nondiscriminatory income tax applied to the salary of the employee of the government or its instrumentality is the same whether a State or national government is concerned. The court departed completely from the old rule that the Federal Gov-

ernment could not be burdened in any way, and took the position that certain burdens are presupposed by the Constitution and if the burden were not direct, no immunity could be claimed.

The two cases from other jurisdictions, namely, *Andrews* v. *Auditor*, 69 Va. (28 Grat.) 115 (1877), and *People ex rel. Donner-Union Coke Corp.* v. *Burke*, 204 App. Div. 557, 198 N. Y. S. 601 (1923), relied upon by the Government are cases which were decided before the adoption by this court of a narrow construction of the immunity doctrine. Their importance is historical rather than persuasive, in the light of present judicial thinking.

In the recent case of *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941), this court held that the right of the Federal Government to be free from taxation by the States does not mean that the Federal Government is relieved from paying the added costs which are attributable to taxation of those who furnish supplies to the Government and have been granted no immunity by Congress.

Dunn Construction Company, a contractor, constructing an Army camp for the Government under a cost-plus-fixed-fee contract, ordered and received lumber from King & Boozer, lumber dealers. The State of Alabama imposed a sales tax on King & Boozer by reason of this sale. The seller resisted on the ground that the sale was for Government work and therefore nontaxable.

The Alabama statute imposes a tax on the seller, but makes it the duty of the seller to add to the sales price and collect from the purchaser the amount due on account of said tax. The seller is required to pay the tax when actually collected from the purchaser.

The Government intervened in the case and claimed that King & Boozer, the supplier, was exempt from the payment of the tax. The Government's position was twofold: (1) Under the provisions of the contract, title to the lumber became vested in the Government upon delivery and ac-

ceptance at the site by its Contracting Officer; hence the Government was the "purchaser" upon whom the tax was imposed by the Alabama statute. (2) The contractor was acting as an instrumentality of the Government in the procurement of material required for the performance of the Government's function, and the sale by King & Boozer to a Government instrumentality was consequently tax exempt.

This court held that King & Boozer, the supplier of the lumber to the contractor, was subject to the sales tax. The court held that the contractor was an independent contractor and not such an instrumentality of the Government as to immunize it from a sales tax. Under Alabama decisions, the provisions of the taxing statute were held to impose a legal obligation on the purchaser to pay the tax. In the opinion of this court, the purchaser was the person who ordered and paid for the goods and on whose credit the sale was made. The contractor purchased the goods in its own name and on its own credit. The court held that, while the Government could have elected to furnish the lumber, the Government had not done so and was only required under its contract to reimburse the contractor.

The contract between the Government and Dunn Construction Company in *Alabama* v. *King & Boozer* and the contract between the Government and Mesta contain the following identical provisions:

1. Title vests in the Government upon inspection and acceptance of the materials by the contracting officer of the Government at the site of the work;
2. Contracts entered into by the contractor are to be assignable to the Government;
3. The Government reserves the right to make the purchases direct instead of through the contractor;
4. The contractor is required to make all contracts in its own name and not to bind the Government;

5. The Government is to reimburse the contractor for all materials purchased;

6. All taxes which the contractor is required to pay as a result of its contract with the Government are to be reimbursed by the Government.

The Government has strenuously attempted to distinguish the facts in the instant case from those obtaining in *Alabama* v. *King & Boozer* so as to avoid the principles there established. It is submitted the distinctions sought to be made are distinctions without differences. While the Alabama case involved a sales tax and the instant case a tax on the *res*, the applicable principles are the same.

The Government's position in the case at bar is no stronger than its position in *Alabama* v. *King & Boozer*. In both cases, the contractor was operating independently[8] and not as an agent or instrumentality of the Government. In both cases, title was reserved in the Government to all material and equipment acquired by the contractor, the material accepted by the contracting officer for the Government at the contractor's plant without change of possession or control. In both cases, the impact of the economic burden of the tax is passed directly and exclusively to the Government, under the specific provisions in the contract requiring reimbursement by it for all taxes paid by the contractor as a result of the contract with the Government. In both cases, the incidence of the tax falls upon the contractor and not upon the Government.

It is noteworthy that in *Alabama* v. *King & Boozer* this court tacitly jettisons the "economic burden" test and establishes a new test for determining Federal immunity—the "legal incidence" test. In conformity with the recently

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[8] *Article I-A* specifically provides that Mesta shall act as an independent contractor and not as an agent of the Government (R. 41): "The Contractor shall as an independent contractor and not as an agent of the Government . . . on a cost-plus-a-fixed-fee basis . . ."

established trend of stringently restricting the scope of the doctrine of the implied immunity of the Federal Government from taxation, the court looks to the formal identity of the taxpayer. Where the legal incidence of a tax falls upon a contractor and not on the Government, no immunity is established even though the direct effect of the tax is to increase the cost to the Government. The identity of the taxpayer upon whom the tax is imposed is of controlling importance under the "legal incidence" test.

In a final effort to avoid the imposition of the ad valorem tax here involved, the Government urges that the legal incidence of the tax falls upon the Government and not upon Mesta. The purpose of this argument is patently to bring the instant case within the preview of the recent decisions of this court which make the legal incidence of a tax of controlling importance.

VII. The Legal Incidence of the Tax Falls Upon the Contractor, Not the Government

Under Pennsylvania taxing statutes, either the real or the record owner may be assessed by the taxing authorities. Where the record owner is assessed, he has a right under Pennsylvania decisions to recovery of the tax from the real owner.[9] The right of recovery, the Government argues, places the "legal incidence" of the tax upon the real and not the record owner. Since the "real" owner of the machinery, the Government, is immune from paying local taxes, Mesta does not have such right of recovery aside from contract. The Government therefore concludes that a municipality cannot elect to tax a record owner where it could not tax the real owner in the first instance because of constitutional immunity and where the record owner has no right under the Constitution to recover from the real owner.

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[9] *Pennsylvania Co.* v. *Bergson*, 307 Pa. 44 (1932);
N. Phila. Tr. Co. v. *Heinel Bros., Inc.*, 315 Pa. 385 (1934).

The Government in its brief filed with this court (p. 29) states its argument in the following manner:

> "If the court purports to give Mesta such a remedy (of reimbursement), it is evident at once that the scheme of the State law is to place the legal incidence of the tax on the Government. But if, because Mesta deals with the United States, the State law fails to give a remedy of reimbursement, which is available to all others in their similar dealings with private individuals, there is a patent discrimination solely because Mesta does business with the Federal Government."

This strained reasoning is predicated upon a basic fallacy, namely, that the tax is imposed upon the machinery. In point of fact, there is no tax imposed upon machinery by Pennsylvania taxing statutes. Machinery which does not form a part of a mill or manufactory is not taxable at all. Nor is machinery which does form a part of a mill or a manufactory taxable *qua* machinery: it simply increases the taxable value of the mill or manufactory as real estate. Since the Government is not the owner or operator of the mill or manufactory, the taxing authorities could not have elected to tax the Government as the real owner of the mill; Mesta alone could be assessed, for Mesta alone owns and operates a mill or manufactory which is subject to an ad valorem tax. It is therefore clear that the legal incidence of the tax falls squarely upon Mesta, the owner of the mill.

It is difficult to perceive the force of the Government's argument. The right or lack of right of reimbursement does not change the incidence of the tax—its legal incidence is still upon Mesta, the owner of the mill, and not upon the Government. Mesta's right of reimbursement arises from the voluntary agreement of the Government under the contract which it elected to enter into with Mesta.

A similar argument was made by the Government in *Alabama* v. *King & Boozer, supra,* where the Government claimed that the legal incidence of the tax fell upon the

Government, not the contractor. We quote from the opinion of Mr. Chief Justice Stone in that case, at page 9:

> "The contention of the Government is that the tax is invalid because it is laid in such manner that, in the circumstances of this case, *its legal incidence is on the Government rather than on the contractors,* who ordered the lumber and paid for it but who, as the Government insists, have so acted for the Government as to place it in the rôle of a purchaser of the lumber. The argument runs: the Government was a purchaser of the lumber, and but for its immunity from suit and from taxation, the state applying its taxing statute could demand the tax from the Government just as from a private individual who had employed a contractor to do construction work upon a like cost-plus contract." (Italics supplied.)

The contention of the Government did not prevail in *Alabama* v. *King & Boozer* and cannot logically prevail in the case at bar.

In *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261 (1943), this court held that State price control regulations invoked against a contractor selling milk to the United States was not in violation of the immunity doctrine. We quote from the opinion of Chief Justice Stone:

> "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coördination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy. . . ."

In *Mayo* v. *United States*, 319 U. S. 441 (1943), the court again points out the difference between exations on private contractors working for the Government and exactions imposed upon the Federal Government itself. There the

State of Florida attempted to impose an inspection fee upon fertilizer which the United States owned and was distributing within the State pursuant to the provisions of the Soil Conservation and Domestic Allotment Act. We quote from the opinion of Mr. Justice Reed in declaring the tax invalid (p. 447):

> "These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required before executing a function of government. Such a requirement is prohibited by the supremacy clause. We are not dealing, as in Graves v. New York ex rel. O'Keefe, supra, with a tax upon the salary of an employee, or as in Alabama v. King & Boozer, 314 U. S. 1, with a tax upon the purchases of a supplier, or as in Penn Dairies v. Milk Control Commission, 218 U. S. 261, with price control exercised over a contractor with the United States. In these cases the exactions directly affected persons who were acting for themselves and not for the United States. These fees are like a tax upon the right to carry on the business of the Post Office or upon the privilege of selling United States bonds through Federal officials. Admittedly, the state inspection service is to protect consumers from fraud, but, in carrying out such protection, the Federal function must be left free. This freedom is inherent in sovereignty."

It may be that "the power to tax involves the power to destroy" if unlimited (though properly limited to nondiscriminatory taxes it involves no such threat), but the converse is equally true and we submit that "the power to claim tax immunity involves the power to destroy" local government if the power of the United States to create such immunity for private industry is unlimited. There is no express constitutional exemption in the Federal Constitution and the same salutary judicial principles which prevent taxation from becoming oppressive to government

likewise should prevent tax exemption from becoming oppressive to government. When it is asserted by the government that the "right" to tax exemption extends to private industry because of private contracts with private persons the salutary principles upon which tax immunity was originally predicated ceases to have any application unless it be the converse application suggested above. There is no threat here to destroy federal government. There is a threat here to seriously cripple local government.

It is the purpose of this brief to place emphasis upon the general principles of tax exemption applicable to tax problems affecting the country as a whole. Such general principles are pertinent to the present case. Since the case originated in Pennsylvania those principles must be applied to the Pennsylvania statutes and judicial decisions. We believe however that this case can and should be decided upon fundamental principles of tax liability and exemption and these principles we shall endeavor to develop.

In general we shall present the proposition that tax immunity is not absolute but is coextensive with the threat to sovereignty and ceases when the threat ceases, that there is no threat in this field of taxation and indeed there is no burden at all except that created by the contracts of the parties, and that in ascertaining the existence of a threat to sovereignity we are not concerned with nominal title or ownership nor with the form or framework of transactions ingeniously devised by over-zealous public servants but are concerned only with substance and realities.

CONCLUSION

In conclusion, it is respectfully submitted that no unbending test has been established to determine when the immunity doctrine shall be invoked. Unlike Procrustes, who placed his victims upon a rack, stretching them if too short, lopping them off if too long, the present tendency of this Court is to set no rigid formula for the application of the immunity doctrine but to inquire in each instance into the realities of the situation. Where the tax is nondiscriminatory and there is no genuine interference with the functioning of the Federal Government and the incidence of the tax falls upon private interests, this Court has refused to invalidate the imposition of local taxes.

No tax is imposed in Pennsylvania upon machinery as such. The value of machinery forming an integral part of a mill is included in the assessment of the mill for purposes of ad valorem taxation regardless of its severability and irrespective of its ownership. Mesta alone is the owner and operator of a mill which is subject to assessment for real estate purposes. Moreover Mesta, not the Government, is the owner of the machinery; Mesta, not the Government, is the record and the real taxpayer.

The Government points to the importance of the question presented by the case at bar because of the billions of dollars' worth of equipment forming integral parts of plants of cost-plus contractors throughout the country which will be subject to local taxation if the decision of the Supreme Court of Pennsylvania is upheld. Indubitably, the validation of assessments of this character will measurably increase the cost of waging the war, but the impact of this cost will be diffused throughout the country as a whole. On the other hand, a contrary ruling would throw a back-breaking burden upon local governments where war plants are located.

It is earnestly submitted that there is neither authority nor sound reason for holding that the assessments made

against the Mesta mill are invalid. The involved and circuitous reasoning by which the Government emerges as the owner of the machinery and the real taxpayer is a defense-in-depth maneuver that is readily penetrated. The decision of the Supreme Court of Pennsylvania should be affirmed.

This brief is respectfully submitted on behalf of the member cities of The National Institute of Municipal Law Officers.

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SUPREME COURT OF THE UNITED STATES.

No. 417.—October Term, 1943.

The United States of America and Mesta Machine Company, Appellants, *vs.* County of Allegheny, Pennsylvania. } Appeal from the Supreme Court of the State of Pennsylvania.

[May 1, 1944.]

Mr. Justice Jackson delivered the opinion of the Court.

We are called upon to solve another of the recurring conflicts between the power to tax and the right to be free from taxation which are inevitable where two governments function at the same time and in the same territory. In arguing the case of *McCulloch* v. *Maryland*, Luther Martin, Attorney General of Maryland, himself a member of the Constitutional Convention, said, "The whole of this subject of taxation is full of difficulties, which the Convention found it impossible to solve, in a manner entirely satisfactory. The first attempt was to divide the subjects of taxation between the State and the national government. This being found impracticable, or inconvenient, the State governments surrendered altogether their right to tax imports and exports, and tonnage; giving the authority to tax all other subjects to Congress, but reserving to the States a concurrent right to tax the same subjects to an unlimited extent. This was one of the anomalies of the government, the evils of which must be endured, or mitigated by discretion and mutual forbearance." *McCulloch* v. *Maryland*, 4 Wheat. 316, 376. Where discretion and forbearance have failed it often has fallen to this Court to determine specific cases for which the Convention was unable to agree upon a general rule. Looking backward it is easy to see that the line between the taxable and the immune has been drawn by an unsteady hand.

But since 1819, when Chief Justice Marshall in the *McCulloch* case expounded the principle that properties, functions, and instrumentalities of the Federated Government are immune from

taxation by its constituent parts, this Court never has departed from that basic doctrine or wavered in its application. In the course of time it held that even without explicit congressional action immunities had become communicated to the income or property or transactions of others because they in some manner dealt with or acted for the Government:[1] In recent years this Court has curtailed sharply the doctrine of implied delegated immunity.[2] But unshaken, rarely questioned, and indeed not questioned in this case, is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation. The real controversy here is whether, especially in view of recent decisions, taxing authorities of the Commonwealth of Pennsylvania have infringed this admitted immunity.

Mesta Machine Company, an appellant with the United States, exists as a corporation under the laws of Pennsylvania and has a manufacturing plant in the County of Allegheny, of that Commonwealth, the County being appellee herein. It is engaged in the manufacture of heavy machinery. In October 1940, the War Department desired to produce a quantity of large field guns. It could have assembled an organization, created a government-owned corporation, and erected a plant which would have been wholly tax immune. *Clallam County* v. *United States*, 263 U. S. 341. But for reasons of time and policy it chose to utilize a going concern under private management and ownership. Mesta's plant was not equipped for the manufacture of ordnance. It was agreed that certain additional equipment specially required for the work should be furnished at Government cost and should remain the property of the United States.

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[1] See Dobbins v. Commissioners, 16 Pet. 435; Collector v. Day, 11 Wall. 113; New York *ex rel.* Rogers v. Graves, 299 U. S. 401; Osborn v. Bank, 9 Wheat. 738; Owensboro National Bank v. Owensboro, 173 U. S. 664; Choctaw & Gulf R. Co. v. Harrison, 235 U. S. 292; Gillespie v. Oklahoma, 257 U. S. 501; Jaybird Mining Co. v. Weir, 271 U. S. 609; Federal Land Bank v. Crosland, 261 U. S. 374; Telegraph Co. v. Texas, 105 U. S. 460; Leloup v. Port of Mobile, 127 U. S. 640; Indian Motocycle Co. v. United States, 283 U. S. 570; Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U. S. 218; Graves v. Texas Co., 298 U. S. 393.

[2] See Alabama v. King & Boozer, 314 U. S. 1; Graves v. New York *ex rel.* O'Keefe, 306 U. S. 466; James v. Dravo Contracting Co., 302 U. S. 134; Helvering v. Gerhardt, 304 U. S. 405; Helvering v. Mountain Producers Corp., 303 U. S. 376.

The basic arrangement between Mesta and the Government was provided for by three separate titles of a single contract, made in October 1940. A title was devoted to each feature of the arrangement, being generally: procurement of Government-owned equipment at Government cost; lease of such equipment by the Government to Mesta; and Mesta's undertaking to make and deliver the guns at a fixed price each. In February 1941 a supplemental contract was made.

Under the first title of the contract machinery was to be procured in three possible ways: Mesta, as an independent contractor and not as agent of the Government, could purchase it; Mesta could manufacture it; or the Government at its option could furnish any part of it. In carrying out the agreement Mesta manufactured one machine, the Government furnished eight gun-boring lathes and two rifling machines from its Watervliet Arsenal, and the rest Mesta purchased from other machine-tool manufacturers. The machinery bought or built by Mesta was inspected and accepted on behalf of the United States, which thereupon compensated Mesta as agreed. The contract provided that title to all such property should vest in the Government upon delivery at the site of work and inspection and acceptance.

By the second title of the contract the Government leased this equipment to Mesta for the period during which guns are manufactured by it under this contract or later supplements. As rental Mesta agreed to pay the sum of one dollar. Mesta was permitted to use the equipment "for the purpose of expediting the manufacture of guns" and for no other, without consent, except that such machinery as was "purchased or furnished to supplement its existing facilities" might be used "for general purposes." Liability of Mesta for loss, damage, or destruction of equipment was "that of a bailee under a mutual benefit bailment." Mesta could not remove any of it without permission, and at all times it was accessible to Government inspection. On termination of the gun-supply contract, unless a stand-by contract was made, Mesta agreed to remove and ship the equipment according to Government directions, in good condition subject to fair wear and tear and depreciation.

The leasing title of the contract made no mention of taxation. The equipment-procurement title provided for reimbursement of Mesta "in the performance of the work under this Title" for

payments "under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel." The gun-supply title recited that the contract price did not "include any tax imposed by any state, county, or municipality upon the transaction of this purchase of guns. The Government shall not be liable, directly or indirectly, for the payment of any such taxes, except that if the Contractor after using every effort short of litigation to procure exemption or refund, as the case may be, should be compelled to pay to any state, county or municipality, any tax upon the transaction of this procurement, an amount equal to the tax so paid shall be paid by the Government on demand of the Contractor, in addition to the prices herein stated." The Government admits liability to reimburse Mesta if it is obliged to pay tax by reason of the assessment in question here.

The machinery was bolted on concrete foundations in Mesta's plant on real property owned by it. It could be removed without damage to the building.

The present controversy flared when the assessing authorities of Allegheny County revised Mesta's previously determined assessment for ad valorem taxes. They added thereto the value of the machinery in question, fixed at $618,000. This included property acquired from other tool manufacturers as above described, $444,000; that manufactured by Mesta, $14,000; lathes brought from the Watervliet Arsenal, $160,000. Mesta protested and exhausted administrative remedies without avail, and on July 30, 1942, paid under protest $5,137.12, the amount of the tax attributable to this increased assessment.

Mesta took a timely appeal allowed by statute to the Court of Common Pleas. The United States petitioned to intervene, reciting that it would be required to reimburse Mesta by force of its contract. Intervention was permitted against objection by the County, and the United States has participated in the litigation since. Mesta attacked the assessment under both state and federal law, claiming that under the State Tax Law property belonging to another was not to be considered a part of its mill and that if construed to authorize assessment and taxation of this machinery, the statute violated the Federal Constitution.

The Court of Common Pleas held that the State Act authorized the assessment, but that the machinery here involved was "owned by the United States" and so for constitutional reasons could not be included.

The Supreme Court of Pennsylvania, on appeal of the County, reversed, and reinstated the assessment. It held that under the state law regardless of who held the title to it the machinery constituted a part of the mill for purposes of assessment and was properly assessed as real estate. It acknowledged that property held by the United States is "beyond the pale of taxation" by a state, but this assessment, it said, is not against the United States but against Mesta, which is operating its mill for private purposes. If Mesta defaulted in tax payments, the Court held that "the paramount rights of the government in the machinery could not be divested or in any way affected," hence the government could suffer no loss. Evidence that the machinery was not owned by Mesta it held to be irrelevant and improperly admitted. Two Justices dissented.

The United States and Mesta appealed and we postponed consideration of jurisdictional questions to the hearing on the merits.

I.

It is denied that the Government has valid title to the machinery. This contention is urged by the member cities of the National Institute of Municipal Law Officers, permitted to file a brief and to argue orally as *amici curiae*. Their position is that "the Government is subject to the legal rules applicable to private transactions." Under Pennsylvania law transfer of title to personal property to be good as against subsequent purchasers and lienors must be accompanied by delivery of possession. They say that inspection and acceptance by a contracting officer on behalf of the United States at the Mesta plant did not under decisional law of Pennsylvania amount to delivery of possession to the United States and hence that its title is defective. The position of the County is less extreme. It argued earlier in the litigation that the machinery became part of Mesta's real estate upon installation and that the United States had only "a reversionary interest after the termination of the contract." It later conceded that title to the property was not in Mesta "except for tax purposes." The Pennsylvania Supreme Court thought it immaterial

whether title was in the Government, but said, " . . . this private arrangement between the Mesta Company, the owner of the land and buildings and operator of the mill, and the Federal government, the owner of the machinery, which treats the equipment as personal property and permits the latter to remove it at the termination of the contract, can in no way change the legal effect of the Act of Assembly which specifically designates machinery, under these circumstances, as real estate for tax purposes."

We do not determine whether, under Pennsylvania law, the retention of possession by Mesta would protect only good-faith purchasers or lienors who relied upon it or whether, as urged by the *amici*, it also makes the Government's title imperfect as against these taxing authorities, who were fully advised of the Government's claim before the assessment was made. Even if the latter were true, we do not think the state law would be decisive of the question of title.

The Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." Art. IV, Sec. 3, cl. 2. It also gives Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution" all powers vested in the Government or in any department or officer thereof, Art. I, Sec. 8, cl. 18, and it makes the laws of the United States enacted pursuant thereto "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl 2.

Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. In this case no contention is made that the contract with Mesta is not fully authorized by the congressional power to raise and support armies and by adequate congressional authorization to the contracting officers of the War Department. It must be accepted as an act of the Federal Government warranted by the Constitution and regular under statute.

Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority

were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *Jackson County* v. *United States*, 308 U. S. 343; *Carpenter* v. *Shaw*, 280 U. S. 363; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *United States* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452; see *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447; *Deitrick* v. *Greaney*, 309 U. S. 190; *Federal Land Bank* v. *Bismark Lumber Co.*, 314 U. S. 95. Federal statutes may declare liens in favor of the Government and establish their priority over subsequent purchasers or lienors irrespective of state recording acts. *Detroit Bank* v. *United States*, 317 U. S. 329; *United States* v. *Snyder*, 149 U. S. 210. Or the Government may avail itself, as any other lienor, of state recording facilities, in which case, while it has never been denied that it must pay nondiscriminatory fees for their use, the recording may not be made the occasion for taxing the Government's property. *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21.

We hold that title to the property in question is in the United States and is effective for tax purposes.

II.

The County denies, however, that it is taxing property belonging to the United States. First, it says it taxes only the land, which the United States does not own; and the machinery is not taxed, but is considered only as an enhancement of the value of the land to Mesta, its owner. Secondly, it says the lien of the tax does not encumber and the process of collection does not involve any sale or other interference with the machinery. The Pennsylvania Supreme Court has upheld the questioned tax because upon these grounds it concluded that no interference with the federal function resulted.

"Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." *Carpenter* v. *Shaw*, 280 U. S. 363, 367-68.

It is not contended that the scheme of taxation employed by Pennsylvania is anything other than the old and widely used ad valorem general property tax. This taxation plan involves the identification and valuation of the variable individual holdings to be taxed, commonly called the assessment, the application of a uniform rate calculated on the need for public revenues, and the collection, in default of payment, by distraint and sale of the property assessed and taxed. This form of taxation is not regarded primarily as a form of personal taxation but rather as a tax against the property as a thing. Its procedures are more nearly analogous to procedures *in rem* than to those *in personam*. While personal liability for the tax may be and sometimes is imposed, the power to tax is predicated upon jurisdiction of the property, not upon jurisdiction of the person of the owner, which often is lacking without impairment of the power to tax. In both theory and practice the property is the subject of the tax and stands as security for its payment.

The Pennsylvania statutes embody this scheme of taxation. They are a century old. The basic provision reads: "The following *subjects and property* shall . . . be valued and assessed, and *subject to taxation.*"[3] Taxes are "declared to be a *first lien on said property.*"[4] [Emphasis supplied.] It is only under these legislative provisions that the tax in question is laid.

The procedure of the assessors is consistent with no other theory than that the machinery itself was being assessed and taxed exactly as land was being assessed and taxed. The Government-owned machinery was inspected and itemized by the assessor, each machine was then separately appraised by a machinery expert, and the aggregate full values of $618,000 were carried into the assessment. The assessment against Mesta was entered in the books of the assessors as follows: "Land, $293,795; Buildings, $1,123,124; Machinery, $2,489,085; Total assessment, $3,906,004." The machinery item included the value of the Government's property.

The assessors made no claim that the temporary presence of the Government's machinery actually enhanced the market value or the use value of Mesta's land. The assessors simply and forth-

[3] Penn. Stat. Ann. (Purdon) tit. 72, § 5020-201.

[4] *Id.*, tit. 53, §2022.

rightly valued Mesta's land as land, and the Government's machines as machinery, and added the latter to the former. We discern little theoretical difference, and no practical difference at all, between what was done and what would be done if the machinery were taxed in form. Its full value was ascertained and added to the base to which the annual rates would apply for county, city, borough, town, township, school, and poor purposes.

We hold that the substance of this procedure is to lay an ad valorem general property tax on property owned by the United States.

III.

It is contended, however, that Government title does not prevent such state taxation, because the incidence of the tax is borne by Mesta, not the Government, and the taxation creates no lien upon its property or interference with its function.

The Commonwealth certainly has broad powers and choices of methods to tax Mesta, a corporation created by it and domiciled and operating within its borders. The trend of recent decisions has been to withdraw private property and profits from the shelter of governmental immunity, but without impairing the immunity of the State or the Nation itself. Benefits which a contractor receives from dealings with the Government are subject to state income taxation.[5] Salaries received from it may be taxed.[6] The fact that materials are destined to be furnished to the Government does not exempt them from sales taxes imposed on the contractor's vendor.[7] But in all of these cases what we have denied is immunity for the contractor's own property, profits, or purchases. We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands. The distinction between taxation of private interests and taxation of governmental interests, although sometimes difficult to define, is fundamental in application of the immunity doctrine as developed in this country.

Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. Its leasehold in-

[5] James *v.* Dravo Contracting Co., 302 U. S. 134.

[6] Graves *v.* New York *ex rel.* O'Keefe, 306 U. S. 466.

[7] Alabama *v.* King & Boozer, 314 U. S. 1.

terest is subject to some qualification of the right to use the property except for gun manufacture, is limited to the period it engages in such work, and is perhaps burdened by other contractual conditions. We have held that where private interests in property were so preponderant that all the Government held was a naked title and a nominal interest, the whole value was taxable to the equitable owner. *Northern Pacific Ry. Co.* v. *Myers*, 172 U. S. 589; *New Brunswick* v. *United States*, 276 U. S. 547. But that is not the situation here, and the State has made no effort to segregate Mesta's interest and tax it. The full value of the property, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment.

It is contended the whole value of the property may be reached since the impact of the tax is upon Mesta. In support of this we are reminded that the tax, so the Supreme Court of Pennsylvania held, falls upon the real estate alone, because the lien thereof does not touch the Government's property, which before or after tax default may be removed. But renunciation of any lien on Government property itself, which could not be sustained in any event, hardly establishes that it is not being taxed. The fact is that the lien on the underlying land is increased because of and in proportion to the assessment of the machinery. If the tax is collected by selling the land out from under the machinery, the effect on its usefulness to the Government would be almost as disastrous as to sell the machinery itself. The coercion of payment from compelling the Government to move its property and interrupt production at the Mesta plant would defeat the purpose of the Government in owning and leasing it.

We think, however, that the Government's property interests are not taxable either to it or to its bailee. The "Government" is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed as we have held. But neither he nor the Government can be taxed for the Government's property interest. Rarely does a state or municipality pursue the Federal

Government itself. Most of the immunity cases we have been called upon to deal with involved assertion of a right to tax Government property against an individual. In *United States* v. *Rickert*, 188 U. S. 432, this Court decided that improvements made upon lands to which the United States held title but which were put in possession of Indians for their benefit remained immune from taxation and that cattle, horses, and chattels purchased with the money of the Government and "put into the hands of the Indians to be used in execution of the purpose of the Government in reference to them" were likewise immune from taxation. In *Van Brocklin* v. *Tennessee*, 117 U. S. 151, Tennessee attempted to sell for state taxes lands which the United States owned at the time the taxes were assessed and levied, but in which it had ceased to have any interest at the time of sale. There, as here, it was claimed the collection affected only private persons, whose equities in the matter were at least doubtful, and that the United States could suffer no harm. The Court held, however, that the immunity protected the private owner for the tax had been laid against an interest of the Government which was beyond the reach of state taxing power. See also *Irwin* v. *Wright*, 258 U. S. 219; *Lee* v. *Osceola Improvement District*, 268 U. S. 643.

A state may tax personal property and might well tax it to one in whose possession it was found, but it could hardly tax one of its citizens because of moneys of the United States which were in his possession as Collector of Internal Revenue, Postmaster, Clerk of the United States Court, or other federal officer, agent, or contractor. We hold that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee.

IV.

We find no support for the claim that the immunity has been waived. Congress certainly has not done so. It is true that the contract requires Mesta to obey and abide by the "applicable" law of Pennsylvania. But such language does not require Mesta to submit to unconstitutional exactions. It clearly is inadequate to waive federal immunity, even if we assume a contracting officer had power to do so. Likewise any contractual obligation of the War Department to pay Mesta's taxes does not operate either to

waive or to create an immunity. Nor is the validity of the tax dependent upon the ultimate resting place of the economic burden of the tax. We also think it immaterial what, if any, right of reimbursement the Pennsylvania law grants a lessee against a private lessor in similar circumstances. State law could not obligate the Central Government to reimburse for a valid tax, much less for an invalid one.

Each party urges equities in its favor. The Government points to the exigencies of war, points to numerous and increasing state efforts to tax such property, and urges against the decision below that it is a precedent for taxation of a substantial portion of property of the Government valued at 7½ billion dollars in the possession and use of private contractors engaged in war production. It owns property on private lands, under contracts similar to this, with a value approximating two billion dollars, over $257,000,000 of it located in Pennsylvania.

Appellees, and especially the *amici*, on the other hand, point for a different purpose to the amount of Government property in war production. It is said that increased municipal services, to serve and protect the influx of war workers, are required in all communities where large war contracts of this type are placed; that such local services rely heavily on real estate taxation; that to exclude property such as this, together with the large real estate holdings that have been and are being acquired by the Government, imposes this increased cost on others. While validation of assessments of this character will measurably increase the cost of waging the war, it is argued that the Federal Government may diffuse the cost throughout the country instead of putting a back-breaking burden on local governments where war plants are located. For these reasons we are urged to hold the position of the Government "unsound, as well as inequitable."

Such considerations remind us of our heavy responsibility in deciding the issues but hardly provide a guide or alter the usual principles for decision. The equities in this unfortunate conflict between the United States and one of its most important industrial communities are not capable of judicial ascertainment or equalization. Whether a county loses more than it gains by such federal activity, and what other federal benefits ought to be considered if a balance were to be struck between advantages and disadvantages, we cannot say. The adjustment of benefits and

burdens is for other departments, and studies to that end have been undertaken.[8] We can only say that our constitutional system as judicially interpreted from the beginning leaves no room for the localities to impose either compensatory or retaliatory taxation on Government property interests. Their remedy lies in petition to the Federal Congress, which also is their Congress.

V.

Our jurisdiction was questioned by appellee's motion to dismiss, and its consideration was postponed to hearing of the merits. The argument runs that the tax is laid only upon Mesta and therefore only Mesta can question its validity; that if Mesta does so, it can be only under the Fourteenth Amendment; that no question has been assigned under this Amendment and hence the appeal should be dismissed.

The questions in this case do not arise under the Fourteenth Amendment. They depend on provisions adopted and principles settled long before the Fourteenth Amendment and which exist independently of it.

The United States was admitted to the case as an intervenor. Both it and Mesta raised these questions of taxability, as either may do. The United States may question the taxation in order to protect its sovereignty over the property in question. Mesta as bailee is under a duty to protect the property and may protect itself from unlawful burdens put upon it because of its possession of the property. The tax is calculated and imposed on the land and machinery as a unit, the lien of the assessment on the machinery becomes a lien on the land which can be taken to pay

[8] See eport on Federal Contributions to States and Local Governmental Units with Respect to Federally Owned Real Estate, House Doc. No. 216, 78th Cong., 1st Sess. (1943). This comprehensive report shows the impossibility of generalizing about the equities between the Federal Government and a community in cases dealing with isolated properties. Much federally owned property is held for the accommodation and service of the locality, such as the Post Office or the courthouses. Other is held for general administrative purposes in which the locality has an interest or for the care of wards, such as veterans, in which local inhabitants share with others. The report considers all federally owned real estate and improvements, but not personalty. It shows that the United States had within Pennsylvania on June 30, 1937, property costing $278,519,000, with market value of $151,806,000. The estimated annual tax based on fair market value at local rates would be $3,152,000. But the average annual federal aid to that state is reported to be: 1928-30, $6,834,000; 1931-33, $10,791,000; 1934-37, all kinds, $190,071,000 (excluding FERA, CWA, and WPA: $23,118,000).

the tax occasioned by the machinery. Since the tax must be paid out of Mesta's property it is in a position to challenge the validity of the tax, as was the case in *Van Brocklin* v. *Tennessee, supra.* Both Mesta and the Government made timely insistence that the Pennsylvania Tax Law as applied violates the Federal Constitution. The highest court of the State rendered final judgment against the claim of federal right. We have jurisdiction by appeal. Judicial Code § 237(a). The motion to dismiss is denied.

The Tax Law of the Commonwealth of Pennsylvania as interpreted and applied in this case violates the Federal Constitution in so far as it purports to authorize taxation of the property interests of the United States in the machinery in Mesta's plant, or to use that interest to tax or to enhance the tax upon the Government's bailee. The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice BLACK and Mr. Justice DOUGLAS concur in the result.

Mr. Justice ROBERTS.

I think the judgment of the Supreme Court of Pennsylvania is right and should be affirmed for the reasons stated in its opinion.

If *James* v. *Dravo Contracting Company*, 302 U. S. 134, were not upon our books, or had been decided the other way, I should agree to the opinion of the court. In that case, at the insistence of the United States, this court held that a State gross receipts tax upon payments by the United States to a contractor for erecting structures on United States property was valid because the tax was not laid upon the contract, the Government, its property, its officers, or its instrumentality; was laid upon an independent contractor and was nondiscriminatory. Although admitting that the payment of the tax imposed a burden upon the activities of the United States because it inevitably increased the cost of exercise of its functions, the court nonetheless sustained the exaction. I then thought, as I still think, that the decision overruled a century of precedents in this court.

It was not long before the Government repented its generosity. Four years later, it insisted, in *Alabama* v. *King & Boozer*, 314 U. S. 1, that a state sales tax upon a purchase of building ma-

terials by a contractor who was to incorporate them into a Government project, and where, upon delivery, inspection, and acceptance, they became the property of the Government, was so direct a tax on the Government as to infringe its constitutional immunity. The court, however, followed to its logical conclusion the decision in *Dravo* and expressly overruled earlier decisions inconsistent with *Dravo* and *King & Boozer*.[1] I concurred in that decision, feeling myself bound by the *Dravo* case.

In this case, as I think, the court necessarily reverts to the test of burdensomeness by a form of words and, as a result, again plunges the applicable principle into confusion.

The truth is that the tax liability of Mesta in respect of its manufacturing plant has been increased by the presence in the plant of machinery bailed to the taxpayer by the federal Government. It is true too that, either as a result of the express terms of the Government's contract with Mesta, the Government's monetary obligation to Mesta will be increased by the imposition of increased tax or, as in the *Dravo* case, if the contractor is liable for an increase of tax by reason of the fact that he is such contractor, the Government, in the long run, will have to pay more for goods and services as a result of such increase.

In order to relieve the Government of this burden, the court is now obliged to say that the law of Pennsylvania is something different from what the Supreme Court of the Commonwealth has declared it, and that a century of State administrative and judicial construction is meaningless when the supposed necessity arises to unburden the Government from the result of State taxation upon privately owned property.

The law of Pennsylvania is, and always has been, that a tax imposed on real estate is enhanced in amount by buildings and machinery placed upon the land with the consent of the owner even though he does not own the improvements but is a mere bailee. The lien of the tax extends only to the land owned by the taxpayer and the bailed improvements are neither under the lien nor subject to seizure or sale for payment of the tax. But this settled law is brushed aside and it is said, notwithstanding these facts, that, in some indefinable way, Pennsylvania has in truth levied an *ad valorem* tax upon property of the United States which is in the possession of Mesta as bailee. This is

[1] Panhandle Oil Co. *v.* Knox, 277 U. S. 218; Graves *v.* Texas Co., 298 U. S. 393.

nothing in substance but to say, in the teeth of the *Dravo* and *King & Boozer* cases, that if a tax levied upon a contractor of the Government imposes a burden upon the Government's activities it violates the constitutional immunity and must be stricken down. Whereas, in those cases, the court accepted the tax for what it was, viz., a tax upon the contractor and not upon the Government, here, although under State law the liability to the State is that of the contractor and his property, and can, in no event, be the liability of the Government or its property,—except as the Government either contractually assumes the burden or bears it as an incident of the contractor's burden,—the court announces that the tax is laid on the Government's property.

I think the case was decided by the court below on a nonfederal ground. The decision is pitched solely upon the character and incidence of the real property tax of the Commonwealth. As that court, in the light of a hundred years of history, defined the tax and the tax lien neither was laid upon or collectable from the United States or its property. As a result of that decision Mesta became liable for an increased tax as a result of certain transactions with the Government. Unless the doctrine of immunity from consequent burden on the Government, as the other party to the contract, is to be reimported into our jurisprudence, the appeal should be dismissed because the decision below was based upon an adequate nonfederal ground.

Mr. Justice FRANKFURTER, dissenting.

I should like to add a few words to the opinion of my brother ROBERTS, with which, in the main, I agree.

This controversy is treated by the Court as though it presented a challenge by Pennsylvania to the authority of the United States. The case is not entitled, on the facts as I understand them, to have such importance attributed to it. We are all agreed that a State must subordinate its policies to the constitutional powers duly exercised by the United States. War of course evokes powers of government not available in times of peace, but it is no less true than of the peace powers of the war powers of the Government, that the Constitution and the laws enacted in accordance with it are "the supreme Law of the Land". United States Constitution, Art. VI.

Implicit in our federal scheme is immunity of the Federal Government from taxation by the States. After having long been the subject of differences of opinion, the extent of this implied immunity was greatly curtailed. The basis of the doctrine was shifted from that of an argumentative financial burden to the Federal Government to that of freedom from discrimination against transactions with the Government and freedom from direct impositions upon the property and the instrumentalities of the Government. The decisions in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, and *Alabama* v. *King & Boozer*, 314 U. S. 1, mean nothing unless they mean that it is not enough that the Government may ultimately have to bear the cost of a part or even the whole of a tax which a State imposes on a third person who has business relations with the Government, when a State could impose such a tax upon such a third person but for the fact that the transaction which gave rise to it was not with a private person but with the Government. So much for the scope of the implied immunity of the Government from state taxation as I understand the decisions to date. But in carrying on effectively the task committed to it, the United States can, I believe, go beyond the judicial doctrine of implied immunity from taxation. I have no doubt that Congress, by appropriate legislation, could immunize those who deal with the Government from sales and property taxes which States otherwise are free to impose.

On the record before us, Pennsylvania has not challenged the implied immunity of the Federal Government from taxation nor has she sought to tax that which Congress has said should be free from taxation. Pennsylvania has not taxed property owned by the Government. Pennsylvania has not used her otherwise unquestioned power of taxation to discriminate against one dealing with the Government. Finally, Pennsylvania has not tried to impose a tax which Congress, in order to facilitate war production, has forbidden the States to levy.

Pennsylvania merely seeks to enforce a tax assessment against the owner of lands and buildings in the manner in which she has made such an assessment for one hundred years. She has assessed real property concededly owned by Mesta at a valuation increased by the value of the machinery made available to Mesta by various arrangements with the Government. But it is the realty that is being taxed, precisely as other realty is taxed, and by pre-

cisely the same method of determining the value of other realty. If the machinery which has here been affixed to the land through arrangements with the Government had been machinery that belonged to Remington Arms and Mesta had been operating through Remington as a sub-contractor for the Government, I suppose no one would doubt that Pennsylvania could assess the value of the land taxed against Mesta as it was here assessed, quite regardless of the retention of the title by Remington of the annexed fixtures, the value of which served to enhance the amount at which the land was assessed. It cannot alter the nature of the tax as a tax against Mesta's ownership of the land and buildings whether the enhancing fixtures belong to the Government or Remington. Constitutional answers do at times turn on a nicety but not on a nicety without at least a nice significance.

The case thus appears to me one that was decided by the Pennsylvania Supreme Court on the settled construction of the Pennsylvania statute as a tax on realty, and not at all as a tax on the only thing that belongs to the United States, namely, machinery annexed to the realty. Here also "there can be no pretence that the Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question". *Nickel* v. *Cole*, 256 U. S. 222, 225. The only interest which the State here taxed was an interest within the power of the State to tax; it was not a federal interest. See *Elder* v. *Wood*, 208 U. S. 226, 232; *New Brunswick* v. *United States*, 276 U. S. 547. The rate at which that interest was taxed is equally a matter for Pennsylvania to determine. In view of the *Bravo* case, *supra*, and *Alabama* v. *King & Boozer*, *supra*, there is not before us a constitutionally immunized burden of the Government. Insofar as the financial burden has been directly assumed by the Government it has been so assumed by arrangements which the contracting officers of the Government saw fit to make with Mesta.

In respect to the problem we are considering, the constitutional relation of the Dominion of Canada to its constituent Provinces is the same as that of the United States to the States. A recent decision of the Supreme Court of Canada is therefore pertinent. In *City of Vancouver* v. *Attorney General of Canada*, [1944] S. C. R. 23, that Court denied the Dominion's claim to immunity in a situation precisely like this, as I believe we should deny the claim of the Government.